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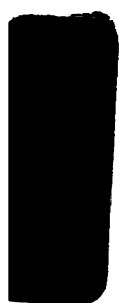
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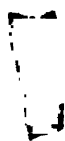
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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AMERICAN DECISIONS.
VOL. XXV.



CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

KNOX v. PROTECTION INSURANCE COMPANY.

[9 CONNECTICUT, 430.]

AN UNADJUSTED LOSS ON A POLICY OF INSURANCE may be reached by the process of foreign attachment.

A CORPORATION IS A PERSON within the meaning of the statute, and is subject to this process.

SOME FACIAS in a process of foreign attachment to recover the amount of a certain policy of insurance, due on a loss by fire to Hugh Findley, an absconding debtor, against whom the plaintiff has recovered judgment to an amount larger than said policy. Defendants demurred.

W. W. Elsworth and T. C. Perkins, for the demurrant. An unadjusted claim is not subject to foreign attachment under the statute: *Gordon v. Bowne*, 2 Johns. 150, 155; *Howlet v. Strickland*, Cowp. 56; *Colson v. Welsh*, 1 Esp. 379; *Crawford v. Stirling*, 4 Id. 207; *Weigall v. Waters*, 6 T. R. 488; *Gillett v. Mawman*, 1 Taunt. 137, 140. A corporation is not subject to this process: *Union Turnpike Road v. Jenkins*, 2 Mass. 37.

Hungerford and F. Parsons, contra, on the first point cited *Hathaway v. Russell*, 16 Mass. 473, 476; and on the second point referred to *Bank of U. S. v. Deveaux*, 5 Cranch, 65, 66; *People v. Utica Ins. Co.*, 15 Johns. 358 [8 Am. Dec. 243]; *Anon.* 1 Vern. 117; *Wych v. Meal*, 3 P. Wms. 310; *Moodalay v. Morton*, 1 Bro. Ch. 469; *Dummer v. Chippenham*, 14 Ves. 245; *Brumly v. Westchester Co. Mfg. Co.*, 1 Johns. Ch. 366.

DAGGETT, C. J. Two questions have been discussed by counsel, and are now to be considered and decided.

1. Is the indebtedness of the defendants such as to authorize this proceeding by way of foreign attachment? That they owe when the copy was left with them, to the absent debtor, in certain sense, or that they were liable to pay him for a loss which they had insured against, is not denied; but it is insisted that this liability does not render them responsible in this suit. In support of this position, they cite the following authorities: *Gordon v. Bowne*, 2 Johns. 150; *Howlet et al. v. Strickland*, Cowp. 56; *Colson et al. v. Welsh*, 1 Esp. 379; *Brown v. Cumins*, 2 Cai. 33; *Crawford et al. v. Stirling*, 4 Esp. 207. These cases all arose and were decided under the statute of set-off. Under those statutes we know that mutual debts only can be set off. No claim for damages which are unliquidated can be set off. This is the extent of those decisions. I do not think that they affect this case. Our statute declares, "that whenever the goods or effects of an absent or absconding debtor are concealed in the hands of his attorney, agent, factor, or trustee, that they can not be found or come at to be attached, or whose debts are due from any person to an absent or absconding debtor; it shall be lawful," etc. It would be an extremely narrow construction of these words to limit them to liquidated debts. The object of the statute is to secure for the benefit of the creditor all the property of the debtor—all his goods, effects, and credits. The defendants owe the absent debtor for a loss; they do not adjust it; but say they will not be responsible for it to his creditors. They are liable to pay him money; and they will pay only when the damages are liquidated. It can be recovered in the same form of action, *vi. assumpsit*. Had the damages been ascertained, there could have been no difficulty; but in that case there would have been only indebtedness. Had the absent debtor sent the goods to sell, or debts to collect, and had they converted them into money, still the account might have remained unsettled, and they have been liable in an action of *assumpsit* or *account*. This objection, therefore, can not prevail.

2. The defendants are a corporation, and therefore not liable to the process of foreign attachment; or, in other words, they can not be made garnishees. I ask, why not? Corporations can become indebted in all the modes in which individuals can. They can receive and hold goods and effects which may be trusted to them. It is difficult, then, to see why they may not be the subjects of garnishment.

There is nothing in the act which would serve to exempt

corporation from liability to this suit, any more than merchants in company, or individuals. The word person is indeed used in the statute. Thus, it is said, that "when debts are due from any person," etc. But a corporation is a person. The general division of persons is into natural and artificial. It has been decided by the supreme court of New York, that under the act for the assessment and collection of taxes, corporations are liable for property owned by them, yet the act speaks only of persons: *The People v. The Utica Insurance Co.*, 15 Johns. 358, 382 [8 Am. Dec. 243]. In England, a corporation seised of land in fee for their own profit are considered as occupiers or inhabitants, and liable to be rated for the poor tax: *Rex v. Gardner*, Cowp. 79. So for the repairs of bridges: 2 Inst. 703.

I am aware that all statutes which speak of persons can not be construed to mean corporations; but such construction ought to be given as will effectuate the intentions of the legislature; such as will promote the object, and prevent the evil in view. To apply this reasonable rule to the question now under consideration: Could the legislature have intended that a debtor might deposit his money or effects in a bank, and then abscond beyond the reach of process, and thus draw from the bank from time to time, and yet the bank not be subject to garnishment? Or could it have been the intention of the statute that a debt due from a corporation should be exempt from the process of foreign attachment?

But it is said that there are cases in point to show that corporations can not be holden as garnishees. *Byard v. Stewart*, 1 Root, 149, was cited. That case decides nothing, except that the garnishee could not send his deposition, instead of appearing before the court and submitting to examination under oath. This point has no bearing on the question. In the *Union Turnpike Road v. Jenkins et al.*, 2 Mass. 37, decided in 1806, it is declared that an aggregate corporation can not be summoned as trustee. No reasons are given for the decision; and with all respect for the learned court, I can not feel bound to assent to that doctrine.

It is further objected that a corporation can not be sworn, and the statute provides expressly for the disclosure of the defendant under oath, in the *scire facias*. This objection comes quite too late. It is established by the subjoined cases that a corporation may be cited to disclose in a court of chancery; and that the secretary or others of the corporation may be made

parties to the bill, and thus a full disclosure may be made: *Anon.*, 1 Vern. 117; *Wych v. Mead*, 3 P. Wms. 310; *Moodalay v. Morton*, 1 Bro. Ch. 469; *Dummer v. Chippenham*, 14 Ves. 245; *Brumly v. The Westchester County Manufacturing Society*, 1 Johns. Ch. 366. They may also be compelled to produce books and papers. If the Protection Insurance Company can be made garnishees, and if they are and were indebted so as to be liable to this suit by foreign attachment, the court will meet with no insuperable obstacle to compel such disclosures as may subserve the purposes of justice, if they are not voluntarily yielded.

The plaintiff, then, must recover.

BISELL and CHURCH, JJ., were of the same opinion.

PETERS, J., dissented.

WILLIAMS, J., being a stockholder of the Protection Insurance Company, gave no opinion.

Demurrer overruled.

A CORPORATION IS A PERSON within the prohibition of an act restraining persons from doing certain acts: *People v. Utica Ins. Co.*, 8 Am. Dec. 243; and in statutes relating to attachments: *Bray v. Wallingford*, 20 Conn. 418; *Flagg v. Platt*, 32 Id. 216.

UNLIQUIDATED DEMANDS ARE DEBTS UNDER THE ATTACHMENT ACT.—*New Haven Saw-mill Co. v. Fowler*, 28 Conn. 108; *Woodruff v. Bacon*, 35 Id. 105.

A CORPORATION MAY BE COMPELLED TO TESTIFY through its officers. Upon this principle, *Knoz v. Protection Ins. Co.* is followed in *Wood v. Hartford Fire Ins. Co.*, 13 Id. 211.

HOLLISTER v. UNION COMPANY.

[9 CONNECTICUT, 436.]

CONNECTICUT RIVER BEING A PUBLIC NAVIGABLE RIVER, *prima facie* and of common right, belongs to the sovereign power.

IMPROVING NAVIGATION OF RIVER.—Lands of individuals bounded on the Connecticut river are granted to those individuals, or to those under whom they claim, by the state, which did not by such grant divest itself of the right and power of improving the navigation of the river.

FOR THE PURPOSES OF NAVIGATION AND FISHERY, a state may do any acts with respect to its public navigable rivers, not inconsistent with the principles of eminent domain.

INDIVIDUAL OWNERS SHOULD PROTECT THEIR BANKS from the incroachment of rivers; the duty does not rest upon the corporation empowered to improve the navigation.

THE PUBLIC BEING THE OWNERS OF THE CONNECTICUT RIVER, have an unquestionable right to improve the navigation of it, without any liability for remote and consequential damages to individuals.

PRIVATE PROPERTY CAN NOT BE CONSIDERED AS TAKEN FOR PUBLIC USE, within the meaning of the constitutional provision, where the lands of individual proprietors are washed away by reason of the acts of a corporation empowered to improve the navigation of a river.

THE WASHING AWAY OF THE LANDS of individual owners by reason of the acts of a corporation in the *bona fide* performance of their powers in the improving the navigation of a river, is a remote and consequential injury for which no action lies.

CASE for consequential injury to the plaintiff's land. The defendants were incorporated under an act of the legislature passed in 1800, for the purpose of improving the navigation of the Connecticut river, from Hartford to the sound. They erected piers, wharves, and did other work not denied to be proper and necessary for the object proposed, and without any design to injure the lands of the plaintiff bordering on the stream. The plaintiff introduced evidence in the county court tending to prove that since the erections made by the defendants, the water had changed from its original channel, and had been caused to flow against his land, undermining and washing away a part thereof, and rendering the rest of little value. He further claimed and offered evidence to prove that the injury would not have happened had the defendants erected works in a skillful manner to effect their object, and without any design to injure any proprietor of land. Defendants insisted that they had erected such works, and urged that the injury, if any, had existed more than fifteen years. It was admitted that the river was navigable where the works were erected, and for several miles above. Verdict in the county court for the plaintiff, but the judgment thereon was reversed in the superior court, whence a writ of error was taken to this court.

W. W. Elsworth, for the plaintiff. The defendants' charter is void, as it authorizes them to take private property without compensation: *Gardner v. Newburgh*, 2 Johns. Ch. 166 [7 Am. Dec. 526]; *Calder v. Bull*, 3 Dall. 386, 388; *Respublica v. Sparhawk*, 1 Id. 357, 362; *Vanhorne's Lessee v. Dorrance*, 2 Id. 304; *Cooper's Justin*. 457; *Lindsay v. Commissioners*, 2 Bay, 38. The statute of limitations is not a bar, as the injury complained of did not happen until within a few years, although the cause thereof took place more than fifteen years ago. There can not be said to be a user for fifteen years with the acquiescence of the plaintiff. He could not object until he was injured:

Sherwood v. Burr, 4 Day, 244 [4 Am. Dec. 211]; *Ingraham v. Hutchinson*, 2 Conn. 584, 590; *Cross v. Lewis*, 2 Barn. & Cress. 686; 3 Kent Com. 356; *Cook v. Hull*, 3 Pick. 269, 271 [15 Am. Dec. 208]; *Daniel v. North*, 11 East, 372, 374, 375; *Wood v. Veal*, 5 Barn. & Ald. 454.

N. Smith and Hungerford, contra.

DAGGETT, C. J. The act of the legislature of 1800, by which this company was incorporated, is declared in its title to be "an act for incorporating a company to clear the channel of Connecticut river." In the fifth section it is enacted, among other things, that the company may "erect and build such wharves, piers, and hedges in said river, or on the banks thereof, as they may judge necessary, they paying to the owner or owners of the land where such wharves may be erected, such sum or sums as may be assessed by the county court of the county where such land may lie."

There were many points raised in the county court which are quite unnecessary to be considered; such as whether the county court ought to have admitted the testimony of the commissioners appointed by a supplemental act of 1806; and whether the statute of limitations could be interposed as a bar to the plaintiff's recovery. This court is called upon now to decide whether the defendants can be liable, in any action, for damages for a consequential injury arising to the plaintiff's land, occasioned by the prudent erection of the defendants' works, without any intention to injure him or others, but in the honest and discreet execution of their powers. I am well satisfied that such an action will not lie; and consequently, the judgment of the superior court must be affirmed, and hence all the other points may be laid out of the case.

The plaintiff in the county court, now defendant, endeavors to place himself on this ground, that if there can not be a recovery in this case for the injury, then a fundamental principle of the common law, and of the constitution of this state, and of the United States, is subverted. The doctrine on which he relies, is this: "The property of no person shall be taken for public use without just compensation therefor." This is, indeed, a fundamental principle of constitutional law. I feel no inclination to impugn it, or in any degree to affect it. The act in question, under which the defendants have operated from their incorporation, expressly recognizes this principle. It provides, in terms, that all lands taken for the purpose of

erecting wharves shall be paid for, according to an assessment of the county court. But the principle now assumed is much broader. The charge of the county court to the jury, was that the defendants were liable for any injury to the land of the plaintiff occasioned by the diversion of the water from its natural course by the erection of their works. By this charge the jury were to lay out of their consideration all acts of the defendants, designed to injure the plaintiff's land—all imprudent and improper acts in the construction of their works—and solely to inquire if the works caused the injury complained of. Such a doctrine can not be sustained.

The following positions relating to this subject, may, I think, be sustained by reason and the most approved authority:

1. Connecticut river, being a public navigable river, *prima facie* and of common right belongs to the sovereign power. This position has been repeatedly advanced by this court, in several recent decisions: *East Haven v. Hemingway et al.*, 7 Conn. 186, 198, 199; *Middletown v. Sage et al.*, 8 Id. 221; *Chapman v. Kimball et al.*, 9 Id. 38. It is also the well-established doctrine of the common law: Harg. L. T. 17, 18, 35.

2. The lands of individuals bounded on this public navigable river, are granted to those individuals, or to those under whom they claim, by the state; but the state did not thereby divest themselves of the right and power of improving the navigation of the river; for the rule in relation to such grants is that they shall be construed most favorably for the public, for whose use the state hold, and against the grantee: 7 Conn. 199; 3 Kent Com. 492 (2d. ed.); 5 Rob. Adm. 182.

3. Upon these principles, the state of Connecticut now hold this river for the purposes of navigation and fishery (unless, indeed, any individual has gained title by grant or prescription to any particular use of it, which is not pretended in this case), and therefore, upon well-established principles of law, may do everything for the full enjoyment of their rights, not inconsistent with the great constitutional principle, that private property shall not be taken for public use, without just compensation.

4. There is no duty imposed upon this company by the charter, to protect the banks of this river from encroachment by the water. This is the duty of the individual proprietors, they having accepted their grants with this burden, and having a compensation in many ways. This idea is supported by a late de-

cision of the king's bench: *Henly v. The Mayor and Burgesses of Lyme*, 5 Bing. 91; 15 Serg. & Lowb. 376, 384.

5. The public, being the owners of this river, have an unquestionable right to improve the navigation of it, without any liability for remote and consequential damages to individuals: *Lansing v. Smith et al.*, 8 Cow. 146. This is a very recent decision of the supreme court of the state of New York. The marginal note of the case is as follows: "The statute (of New York) authorizing the construction of a basin in the Hudson river, in the city of Albany, and erections whereby the docks, etc., owned by individuals alone, were rendered inaccessible or less easily approached by vessels, etc., and therefore much depreciated in value, though it provided no compensation for such a consequence, is not unconstitutional, either as taking private property for public use, without just compensation, or impairing the obligation of contracts. This not being a direct invasion of property, but remote and consequential merely, arising from a public improvement, the injury is one to which individuals must submit, as the price of the social compact, and in the eye of the law the injury is '*damnum absque injuria*.' The injury being common to a large class of the community, it is the subject of indictment only as a common nuisance."

The case was much stronger for the plaintiff than the present. There, by the erections of the defendant in the river, the docks, etc., owned by the plaintiff were much depreciated in value. The principles and reasoning of that learned court are so very apposite to the case under consideration, that they very readily meet my assent. The court say: "If the act be unconstitutional, it must be on the ground that the plaintiff had either at common law, as owner of the adjacent soil, or by virtue of the patent from the state for the land under water opposite to the shore, a claim to the natural flow of the river, with which the state had no right to interfere by any erection in the bed of the river, or in any other manner. This proposition appears to the court too extravagant to be seriously maintained. It denies to the state the power of improving the navigation of the river by dams or any other erections which must affect the natural flow of the stream, without the consent of the proprietors of the adjacent shore within the remotest limits which may be affected by the operation. Every new dock which is erected, partially diverts the natural course of the stream; and upon the principle contended for by the plaintiff, violates the rights of the proprietors of all the docks below it:" *Lansing v. Smith*, 8 Cow. 148. It would

be extremely difficult to see to what extent the doctrine of the plaintiff would not lead. It would certainly lead to this extent, that if any proprietor of land below or above these erections of the defendants could prove any damages to his possessions by any diversion of the water from the natural stream, by their operations, he could recover. Such a doctrine I can not admit.

There is also another case quite in point. I refer to *The Governor and Company of the British Cast Plate Manufacturers v. Meredith et al.*, 4 T. R. 794. It was there decided, "that where the acts of commissioners appointed by a paving act, occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners, or paviers acting under them, are not liable to an action." Lord Kenyon, in that case, thus expresses himself: "If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction. Some individuals suffer an inconvenience under all these acts of parliament; but the interest of individuals must give way to the accommodation of the public." These decisions and opinions are very satisfactory reasons to show that the plaintiff can not recover.

Again, the doctrine of the plaintiff, in my judgment, would lead to this result: that when any person sustains any damage, however remote or consequential, by any turnpike road, improvement of the navigation of a river, any new avenue or street into a large commercial place, or any other alteration of the existing state of things, an action will lie against those who are authorized by the legislature to accomplish such object, if they act within the scope of their powers, and with entire honesty and sound discretion. Such a principle is alike opposed to common sense, common law, and adjudged cases. I can not assent to it.

The defendants have not directly invaded the property of the plaintiff. They have not taken the property of the plaintiff for public use without just compensation; they have not, therefore, brought themselves under the constitutional interdiction; but they have, under the sanction of the authority of the legislature, to which appertained the power of regulating a public navigable river, operated upon this river so as to produce an

inconvenience—a remote and consequential injury to the plaintiff's land. For such an injury no action can be sustained. On this ground the constitutional objection is sufficiently avoided. But in a recent case before the supreme court of the United States, that tribunal has gone still further, and decided that the provision in question is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states: *Barron v. The Mayor and City Council of Baltimore*, 7 Pet. 243.

The judgment of the superior court must therefore be affirmed.

BISSELL and CHURCH, JJ., were of the same opinion.

PETERS, J., concurred in the result, but in coming to it proceeded solely on the ground that a corporation is not liable for a tort.

WILLIAMS, J., being interested in the event of the suit, gave no opinion.

Judgment affirmed.

WITH RESPECT TO THE RIGHT OF THE PUBLIC IN NAVIGABLE STREAMS, see *Lansing v. Smith*, 21 Am. Dec. 89, and note. They belong to the state: *Kellogg v. Union Co.*, 12 Conn. 22.

RIGHT OF NAVIGATION in navigable river is superior to all other rights: *Post v. Munn*, 7 Am. Dec. 570; *Browne v. Kennedy*, 9 Id. 503.

GRANTS TO CORPORATIONS are to be construed most favorably for the public where there exists a reasonable doubt as to the extent of the privileges conferred: *Talcott Mt. Tr. Co. v. Marshall*, 11 Conn. 190.

THE PRINCIPAL CASE IS EXPLAINED in *Hooker v. New Haven & Northampton Co.*, 15 Conn. 318, and in same case, 14 Id. 158, 162, 171, in regard to the power of corporations to cause, for their benefit, injury to others without making a compensation therefor.

EXISTENCE OF AN ANCIENT CHANNEL by which water is diverted from a main stream, does not justify the deepening of the channel so as to cause a greater diversion to the injury of proprietors along the main stream: *Blanchard v. Baker*, 23 Am. Dec. 504.

THE SUBJECT OF EMINENT DOMAIN is considered in the note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Id. 679, and to *Boston & R. M. Corp. v. Newman*, 23 Id. 622.

AUSTIN v. BOSTWICK.

[9 CONNECTICUT, 496.]

ACKNOWLEDGMENT BY A PARTNER THAT A FIRM DEBT IS STILL DUE, although made after the dissolution of the partnership, and while such partner is insolvent, is admissible against his copartner to avoid the bar of the statute of limitations.

IDEM.—But such acknowledgment is entitled to little weight if not honestly made, but rather with a design to charge the copartner.

RECOGNITION OF A DEBT AS ORIGINALLY JUST AND STILL DUE is sufficient to remove the bar of the statute of limitations.

ACKNOWLEDGMENT MADE BEFORE THE STATUTE HAD RUN, postpones the running of the statute from that time.

TO TAKE A JOINT DEBT OUT OF THE STATUTE, it is not essential that the acknowledgments of the parties should be a joint act to render them effective.

DEBT against Bostwick and Gilbert, former partners. It was admitted that the statute of limitations was a bar, unless removed by the following facts: Before the statute had run, the firm became insolvent, and was dissolved, and an attorney, in whose hands the plaintiffs' claim was placed, applied to Gilbert, who said that it was an old copartnership debt, and thought that Austin and Robinson ought to do as the other creditors had done; that they had taken from ten to fifteen per cent. on their claims, and that he was willing to give the same to Austin and Robinson at any time. After the statute had fully run, Bostwick, while still insolvent, the firm having been dissolved, wrote underneath the account:

"The above is a just account against the late firm of Charles Bostwick & Co., and is now due from said firm to the said Austin and Robinson. November 25, 1831. Charles Bostwick."

Judgment for the plaintiffs. Motion for a new trial.

R. S. Baldwin, for the motion. The acknowledgment of a debt by a partner after dissolution of the partnership will not bind his copartner: *Hackley v. Patrick*, 3 Johns. 536; *Walden v. Sherburne*, 15 Id. 409, 424. The declarations of Gilbert were not sufficient to continue the existence of the debt: *Lord v. Shaler*, 3 Conn. 131 [8 Am. Dec. 160]; *Lord v. Harvey*, Id. 370, 372; *Marshall v. Dalliber*, 5 Id. 480; *De Forest v. Hunt*, 8 Id. 179, 185.

N. Smith and Kimberly, contra. The acknowledgment of Bostwick and the declarations of Gilbert are both admissible: 2 Stark. Ev. 892, 894, 895; *Lord v. Shaler, ubi supra*; *De Forest v. Hunt*. It is immaterial whether the acknowledgment is before or after the statute has attached: *Yea v. Fouraker*, 2 Burr. 1099; *Danforth v. Culver*, 11 Johns. 146 [6 Am. Dec. 361]. The acknowledgment of Bostwick is evidence against Gilbert: *Whilcomb v. Whiting*, Doug. 652; *Jackson v. Fairbank*, 2 H. Bl. 340; *Bound v. Lathrop*, 4 Conn. 336 [10 Am. Dec. 147]; *Coil v. Tracy*, 8 Id.

276 [20 Am. Dec. 110]; *Hunt v. Bridgham*, 2 Pick. 581 [13 Am. Dec. 458]; *Frye v. Barker*, 4 Id. 382; *Getchell v. Heald*, 7 Greenl. 26.

DAGGETT, C. J. The acknowledgment of Bostwick, one of the two defendants, was sufficient evidence against him; and there being nothing else in the case, this would doubtless remove the bar created by the statute of limitations, and render him liable. Gilbert, the other defendant, and the copartner with Bostwick, contended on the trial, that the acknowledgment of Bostwick, under the circumstances of his bankruptcy and the copartnership being dissolved, laid no foundation for a new promise, which, it was insisted, must be proved to warrant a recovery. He further contended that his own declarations could not have this effect, for two reasons: 1. Because they were no evidence of a promise to pay the debt. 2. Because they were not made simultaneously with any declaration of Bostwick, and therefore they could have no operation in the case to create a joint promise; and further, they were made before the statute had attached upon the debt.

1. In relation to the admission of the acknowledgment of Bostwick, after the dissolution of the copartnership, and when he was a bankrupt, this court expressed its opinion, very decidedly, in the case of *Coil v. Tracy et al.*, 8 Conn. 268 [20 Am. Dec. 110]. Such testimony is always admissible, coming from a party to the record. What it proves, is another and different question. If from other facts it appears that such testimony is given by the party, with a design to fix a liability on another, it will weigh little. If, as in this case, it comes honestly, and will operate against him who makes it, there is no ground for considering it as destitute of weight.

2. Did the defendants each acknowledge the debt due? That Bostwick did is not denied or doubted; and there is as little ground to say that Gilbert did not. He said it was one of the old copartnership debts; they ought to do with it as the other creditors had done—accept ten or fifteen cents on the dollar; he would pay that at any time. If by this language the debt is not admitted to be due, it may be difficult to find words to express the idea. Every one must understand the defendant as saying, “the debt is due; I will pay a portion of it, as I have of the other partnership debts.”

The recent examination of this question, by this court, in several cases, renders it quite unnecessary to cite authorities, or go into a course of reasoning to show that the recognition of a

debt as originally just, and still due, is sufficient to remove the bar created by the statute of limitations: *Lord et al. v. Shaler*, 3 Conn. 131 [8 Am. Dec. 160]; *Bound et al. v. Lathrop*, 4 Id. 336 [10 Am. Dec. 147]; *Marshall v. Dalliber*, 5 Id. 480; *De Forest v. Hunt*, 8 Id. 179. It is believed that the whole course of decisions is to that effect.

It is again contended that as Gilbert's declarations were made before the statute had attached, there was no bar to be removed. It may be sufficient to reply that he then recognized the debt; and if so, the statute would not attach upon it until the lapse of six years thereafter. Has it not been undoubted law since statutes of limitation have been in force, that the payment of interest prevents the running of the statute, and also does away the presumption of payment of a bond, by the lapse of twenty years? A bond eighteen years old is kept alive twenty years longer by the payment of interest; and that simply because the debt is thus recognized. On this principle, then, the statute never did attach upon this book debt, as it respects Gilbert; and as it respects Bostwick also, it may well be doubted, since the case of *Bound et al. v. Lathrop*, 4 Conn. 336 [10 Am. Dec. 147], if this debt was ever barred. In that case it was decided that the acknowledgment of one joint promisor took the case out of the statute; and so is the well-known case of *Whitcomb v. Whiting*, Doug. 652.

It is further said that there is no joint act of the defendants. Nor is it at all necessary there should be. A note barred by the statute of limitations was presented, on the first of January last, to A. B., one of the promisors. He acknowledges it due. On the first of July last it was presented to C. D., the other promisor. He too declares it due. Has not each of them waived the benefit of the statute; and will not the law compel them to pay it? Had a forged note been so presented and recognized, they would have been holden to pay it.

I am well satisfied that the motion for a new trial ought to be denied.

The other judges were of the same opinion.

New trial not to be granted.

ACKNOWLEDGMENT TO REVIVE DEBT.—See *Olcott v. Scales*, 21 Am. Dec. 585, and cases cited in the note thereto; and also the note to *Frey v. Kirk*, 23 Id. 588.

A PARTNER'S ACKNOWLEDGMENT after the dissolution of the firm does not remove the bar of the statute of limitations as to his copartners: *Levy v. Cadet*, 17 Am. Dec. 650, and note.

STATE v. WESTON.

[9 CONNECTICUT, 527.]

RECEIVERS OF STOLEN GOODS, knowing them to be such, are punishable Connecticut, the same as a principal.

POSSESSION OF STOLEN GOODS is *prima facie* evidence that the possessor is the thief and throws on him the necessity of accounting for his possession.

THE FINDER OF PERSONAL PROPERTY on the highway, who knows, or has the means of knowing, the owner, and converts it to his own use, is a thief.

INFORMATION against Nelson Weston and Anson Weston, for theft, charging them with having stolen certain bank bills amounting to sixty-nine dollars, the property of Hiram Upson. The prosecution proved that part of the bills were found in the possession of the prisoners, and that they had disposed of some; that the notes had been in Upson's pocket-book in his coat hanging up in his shop; and claimed that the prisoners had stolen them. They claimed that Nelson found the pocket-book on the highway, and gave some of the notes to Anson, who was present. They then burned the pocket-book. It appeared that Upson's name was in the book, and that both the prisoners could read. The prisoners' counsel claimed that if these facts were so, Anson was but a receiver of stolen goods, and could not be convicted on this information. Verdict, guilty. Motion for a new trial.

Mix, in support of the motion, cited *People v. Anderson*, 14 Johns. 294 [7 Am. Dec. 462].

N. Smith and R. I. Ingersoll, contra, cited 2 Russ. 1042-1047.

PETERS, J. Receivers of stolen goods, knowing them to be such, are accessories, and by the ancient common law, suffered the same punishment as their principals: 4 Bl. Com. 39, 40; but they could not be tried until their principals were convicted. But now, by our statute, it is provided, "that if any person shall receive and conceal any stolen goods, articles, or things, knowing them to be such, he may and shall be proceeded with as a principal, though the person or persons who committed the theft be not thereof convicted, and shall be tried before the same court and punished in the same manner as if he had been the principal:" Stat. May, 1830, c. 1, sec. 47, p. 261.

It is a well-settled rule, that the possession of stolen goods is *prima facie* evidence that the possessor is the thief, and throws on him the necessity of accounting for his possession: 2 Russ. 1154; *Commonwealth v. Millard*. 1 Mass. 6; 2 Stark Ev. 840.

And it is equally well settled that the finder of personal property on the highway, knowing or having the means of knowing the owner, and not restoring it to him, but converting it to his own use, is a thief, and ought to be punished accordingly: 2 Russ. 1044, 1045.

I do not advise a new trial.

The other judges were of the same opinion.

New trial not to be granted.

LARCENY BY FINDER OF LOST ARTICLES.—*Tyler v. People*, 12 Am. Dec. 176; *People v. Anderson*, 7 Id. 462, and note; *State v. Roper*, 24 Id.

CLARK v. SMITH.

[10 CONNECTICUT, 1.]

WHERE THE ADMISSIONS OF A PARTY ARE USED AGAINST HIM, the whole must be taken together; if part of a statement be admitted, the whole must be admitted, whether explanatory of the part or not.

FOR FAILURE TO RETURN AN ATTACHMENT, the measure of damages is the actual loss which the plaintiff has sustained by reason of the neglect of the officer.

ON THE POINT OF DAMAGES in an action against an officer for neglecting to return an attachment, evidence is admissible to show that the officer informed the plaintiff of the failure of the attachment while the property was in the same situation as before, and that he refused to attach again, saying that he meant to look to the officer.

WHERE BY REASON OF THE NEGLECT OF AN ATTACHING OFFICER, part of the property is seized by other creditors, the creditor can not recover the entire value from the officer, unless the creditor show that he used due diligence to secure the residue.

ACTION against a sheriff for the failure of his deputy, Bill, to return an attachment. The defendant introduced a witness, Minard, who testified that Bill had told him that he, Bill, had attached the property, but failed to return under a mistake as to the court out of which the writ issued. On cross-examination Minard further stated that Bill had also said that he went to the plaintiff immediately on discovering the mistake, informed him thereof, and told him that the property was still in the same situation, and could be attached, and asked him to sue out another writ, or allowed Bill to do so in his, plaintiff's, name, both of which the latter refused to do. This evidence was admitted against the plaintiff's objection. One Smith was introduced by the defendant, who testified that he had a conversation with the plaintiff soon after the writ had failed, in

which he had said that the property was still at liberty, but that he would not attach again, as he had his remedy against the officer. This testimony was also objected to, but received. The defendant in the attachment suit had no other property than that attached. After the service of the plaintiff's attachment, and on the same day, a part of this property was attached by another creditor, and afterwards sold.

Verdict pursuant to the instructions, which appear in substance from the opinion. Motion for a new trial for misdirection and for error in the admission of evidence.

Strong, in support of the motion. The evidence on the cross-examination of Bill ought not to have been received: *Ives v. Bartholomew*, 9 Conn. 309; *Stewart v. Sherman*, 5 Id. 244, 246.

Goddard and Waile, contra, contended that that evidence was admissible, and cited in support of the charge of the court: *Clark v. Smith*, 9 Conn. 380; *Weld v. Bartlett*, 10 Mass. 470; *Young v. Hosmer*, 11 Id. 89; *Russell v. Turner*, 7 Johns. 189 [5 Am. Dec. 254]; *Potter v. Lansing*, 1 Id. 215 [3 Am Dec. 310]; *Planck v. Anderson*, 5 T. R. 40.

BISSELL, J. A new trial is moved in this case on two grounds: 1. That evidence was improperly admitted; and 2. That the rule of damages laid down in the charge is incorrect.

1. It is contended that the declarations of Bill, which were drawn from the witness Minard upon his cross-examination, should not have been received in evidence. The testimony is objected to, first, on the ground that it is irrelevant. This objection is manifestly resolvable into that which is made against the charge to the jury. If the rule of damages there laid down be correct, the testimony was clearly pertinent. The declarations of Bill and the testimony of Smith stand, in this respect, upon the same ground. Both were offered to affect the damages, and both had a direct bearing upon the question submitted to the jury. It is unnecessary, therefore, to pursue the objection further in this place. If the charge can be vindicated, this objection must of course fail.

But it is objected further, that the facts, if relevant, were not proved through the right medium; that these were the declarations of the officer, for whose neglect a recovery is sought, and who is the real party to the action. These declarations clearly could not have been proved, unless the plaintiff had laid the foundation for their introduction by his own course of examination. This, I think, he had done. For the purpose of

proving the neglect, he sought to avail himself of the declarations of Bill as the admissions of the party. This he had an undoubted right to do; and the only claim on the part of the defense was, that the whole conversation, at that time, should go to the jury. This claim I suppose not only to be reasonable, but in conformity to a well-established rule of evidence. For there certainly is no principle better settled than that where the confessions of a party are made use of against him, the whole must be taken together. If part of a statement be admitted, the whole must be admitted: 1 Phil. Ev. 79; Swift Ev. 132; *Carver v. Tracy*, 3 Johns. 427; *Fenner v. Lewis*, 10 Id. 38.

But it has been urged, that the only object of the rule is to obtain the full meaning of the party and prevent him from being misunderstood; and that inasmuch as the declarations of Bill, which came out on the cross-examination of the witness, were not necessary to explain, or give a meaning to that which preceded, they were not within the rule and therefore not admissible. To this objection it might be sufficient to reply that there is no authority for thus narrowing the rule, and that so narrowed it would be exceedingly embarrassing in practice. On the other hand, there is neither inconvenience nor danger in admitting the whole conversation regarding the suit; leaving those declarations which a party makes in his own favor to be weighed by the jury, under the direction of the court.

But this objection has been so entirely met and answered, by a modern decision, that I may be pardoned for quoting from the opinion of all the judges of England, as delivered by the late Lord Tenderden: "The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and, if a counsel chooses to ask a witness anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced upon the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion:" *The Queen's case*, 2 Brod. & B. 298; 3 Stark Ev. 1751.

2. The only remaining question arises upon the charge, whether the rule of damages given to the jury correct?

The basis of the charge is, that the defendant is liable for the damages which the plaintiff has sustained, by reason of the neglect of the officer. The correctness of the principle here laid down will hardly be questioned, when it is recollected that it is substantially the same as that adopted by the statute (Stat., p. 416); and when it is further recollected that the act is in this case, and for a tort; that the plaintiff's claim sounds in damages merely, and damages sustained by reason of the wrongful act or negligence of another.

These damages it is, peculiarly, the duty of the jury to assess, and in so doing, they are not limited to any precise sum. They may give even more than the plaintiff's original debt. When that debt has been lost, by the willful misconduct or negligence of the officer, they may add to it the costs and charges of a second suit. And as the jury may give more than the debt, they may give less; and if it should be found by them that the failure of the officer to return the writ was owing to a mistake, in consequence of which the party had suffered nothing, they might give, and, indeed, it would be their duty to give, only nominal damages: *Bonafous v. Walker*, 2 T. R. 126; *Platt v. Anderson*, 5 Id. 37; 1 Saund. 38, n. 2; *Weld v. Bartlett*, Mass. 470; *Burrell v. Lithgow*, 2 Id. 526. See, also, 3 Stark. 1341, and the cases there cited. It can only be necessary to add that the principle of the charge was directly asserted in this court, on a former hearing of this case: 9 Conn. 379.

But it is contended that the charge goes further, and beyond the principle here established. The jury were, indeed, charged that if they should find that the plaintiff was notified of the failure of his attachment, and that the whole or any part of the property attached was then in the same situation as when the attachment was levied, and might then have been attached and secured to the plaintiff by the use of ordinary diligence, that the defendant was not liable for the value of such property. The charge proceeds upon the ground that, upon the facts as stated, the property, if lost to the plaintiff, was lost by his neglect, and not by reason of the neglect of the officer; and it seems difficult to resist this conclusion, unless the principle to be adopted that in every case where the officer is in default the creditor is obliged to no further diligence, but may follow his hands, and call upon the sheriff for the payment of his debt.

Now, the sheriff stands on no other or different ground, in this respect, than an attorney or any other agent. An attorney is liable for all the damages sustained by reason of his neglect, and so is the sheriff; and beyond this neither the one nor the other is liable. Suppose, then, an attorney be employed to collect a debt. He misconceives his action, or commits some other mistake, in consequence of which the plaintiff is turned round. May he, therefore, neglect or obstinately refuse to renew proceedings? And if in consequence of such neglect or refusal the debt is eventually lost, may he enforce payment of the attorney? And can it be pretended that in an action brought against the attorney for neglect, the amount of the debt would furnish the rule, and the only rule, of damages? Such a conclusion does violence to all our ideas of justice, as well as to the established rules of law. For it may here be remarked that neither the neglect of the officer in the one case, nor of the attorney in the other, had any effect upon the original debt. For that, the debtor still remains liable. And a recovery against the officer or attorney neither bars the action nor diminishes the damages.

But it has been urged that, however the case might have been, had the property, when the notice was given, remained in the same situation as when it was first attached; yet, as a part of it had been removed, under Goddard's attachment, the plaintiff was under no obligation to proceed against the residue, but might hold the sheriff responsible for the whole. It surely can not vary the principle that a part of the property had been abstracted. It is enough that there was property which could have been reached and secured by an attachment. And whether it consisted in the whole or in part, or not at all, of that formerly attached, can make no possible difference. The plaintiff refused to procure an attachment to be issued for his own benefit, or to permit the officer to do so, for his security; and all that is insisted upon in the charge is that the plaintiff shall not visit the consequences of his own obstinacy upon an honest but mistaken officer.

The jury were directed to give damages commensurate with the loss sustained by the officer's neglect. For aught that appears, they have done so; and neither the principles of justice, nor any rule of law, demand of us that we should interfere with their verdict.

The other judges were of the same opinion.

New trial not to be granted.

MEASURE OF DAMAGES FOR SHERIFF'S NEGLIGENCE to sell under an execution *Potts v. Commonwealth*, 20 Am. Dec. 213; *Hodsdon v. Wilkins*, Id. 347. *Jordon v. Gallup*, 16 Conn. 549, and in *Palmer v. Gallup*, Id. 565, the principal case is referred to upon the rule of damages laid down for the failure of an officer to serve process.

ROBINSON v. LYMAN.

[10 CONNECTICUT, 80.]

AN INDORSEE AFTER MATURITY OF A NEGOTIABLE PROMISSORY NOTE considered as receiving dishonored paper, and takes it subject to all infirmities, equities, and defenses to which it was liable in the hands of the payee.

BUT SUCH INFIRMITY, EQUITY, OR DEFENSE, MUST EXIST and attach to the note before its transfer, in order that it may be set up against the indorser in the hands of an indorsee after maturity.

IDEM.—Therefore, an agreement made by the makers and payee of a note while it is in the latter's hands, that sums paid by the former on certain notes of the latter might be applied on the note in question, may be set up against an indorsee after maturity.

IDEM.—But a similar agreement made after the matured note had been transferred is not an equity attaching to the note while in the payee's hands and is not available against the transferee.

AN INDORSEMENT OF A SUM PAID ON A NOTE raises no presumption of payment at what time thereafter it was negotiated.

ACTION by the indorsee against the maker of a negotiable note, for the sum of nine hundred and fifty-five dollars and twenty-one cents, dated October 29, 1827, and payable to J. Moore, or order, thirty days after date. Defendant gave no evidence of intention to set off certain demands due him from Moore. It did not appear when the note was indorsed to the plaintiff, and although he did not contend that he received it before maturity, yet he urged that, from an indorsement of one hundred and forty-two dollars and twenty-seven cents by Moore thereon, dated April 10, 1828, a presumption arose that the note was indorsed immediately thereafter. The court, however, left the question to the jury as a question of fact when the note was negotiated.

One of the claims endeavored to be set off was the amount of a note given by Lyman and Moore, as partners to Pease & Russell, in 1823, which note Lyman was compelled to pay on October, 1829, by legal process. The court refused to instruct the jury that this was a proper matter of set-off. The claims were two sums of two hundred and ninety dollars and fifty-eight cents each, and one of one hundred and ninety dollars and fifty cents, paid under the following circumstances: The firm of Lyman & Moore was dissolved October 27, 1829.

and by an indenture of December 4, 1827, Moore was to settle up the business, collect all the debts, and pay all demands and account to the defendant for one half the balance. In pursuance of this arrangement the note in question was given, it being agreed that the defendant's interest in the partnership should be applied in its extinguishment. In June, 1828, and June, 1829, the defendant transferred money and stock to the amount of two hundred and ninety dollars and fifty-eight cents, each time, to Moore, on account of the note; and at the latter date a balance was struck, showing one hundred and nineteen dollars and fifty cents to be due the defendant. Under the direction of the court the jury found for the plaintiff less the sums of one hundred and forty-two dollars and twenty-seven cents, and the two payments of two hundred and ninety dollars and fifty-eight cents; and both parties moved for a new trial.

Strong and Cleaveland, jun., cited 2 Phil. Ev. 14, n.; 3 Kent Com. 61; 1 Madd. Ch. 425; *Thompson v. Hale*, 6 Pick. 259, 261; *Bay v. Coddington*, 5 Johns. Ch. 54 [9 Am. Dec. 268]; *Boston Type and Stereotype Foundry Co. v. Mortimer*, 7 Pick. 166 [19 Am. Dec. 266]; *Caines v. Brisban*, 13 Johns. 9.

Law and W. F. Brainard, contra. There can be no set-off but between parties to the record: Stat. 434, tit. 2, sec. 32; *Johnson v. Bridge*, 6 Cow. 693; *Prior v. Jacocks*, 1 Johns. Cas. 169. As to set-off between partners, counsel cited *Nevins v. Townsend*, 6 Conn. 5; *Church v. Knox*, 2 Id. 514; *Beach v. Hotchkiss*, 2 Id. 425; *Brewster v. Hammet*, 4 Id. 540.

CHURCH, J. The principle is certainly well established, and not to be denied, that the indorsee of a negotiable promissory note, indorsed after due, is considered as receiving dishonored paper, and takes it subject to all the infirmities and equities, and some cases say defenses, to which it was liable in the hands of the payee. But will the proper application of this principle justify the claim of the defendant in the present case, is the question: 2 Stark. Ev. 293; Chit. on Bills, 126, and cases referred to; *Bishop v. Dexter*, 2 Conn. 419; *Nevins v. Townsend*, 6 Id. 5. There was no infirmity, no illegality, nor legal nor equitable defense existing against the note in question while it remained in the hands of Moore, the payee, growing out of the existence of the note due to Patten and Russell. There was no agreement between the original parties to the note before its transfer, that the defendants should pay to Patten and

Russell their note, and have an application thereof upon the note in question. Indeed, there was no connection, either in fact or by agreement of parties, between the note in dispute and the debt due to Patten and Russell. If payments had been made, either partially or in full; if there had been a disclosure of or a fraud in the consideration of the note, or any illegality therein, or if there had been any agreement between the parties affecting the note before it was transferred to the plaintiff; these or other matters which might be suggested would have created such infirmity, defense, or equity as would have attached to the note in the hands of the plaintiff. Without some infirmity in the note itself, or some matter which would have constituted either an entire or partial defense to it, or without some equity arising out of the note transaction attaching to the note, the indorsee must be considered as holding it free from any claim of mere set-off on the part of the defendant.

This principle is recognized and established by the court at king's bench, in the late case of *Burrough v. Moss et al.* 10 Barn. & Cress. 558; 21 Serg. & Lowb. 128, in which the court says: "The indorsee of an overdue bill or note is liable to set-off equities only as attach on the bill or note itself, and no set-off claims arising out of collateral matters." And Bayley, J. in the same case, says: "The cases have not yet gone the length of establishing that such a set-off not arising out of the bill or note transaction, can be made available against an indorsee even when the bill or note is overdue, at the time of indorsement." The same principle seems to have been admitted by the supreme court of Massachusetts, in the case of *Holland v. Makepeace*, 8 Mass. 418, wherein Sedgwick, J., in delivering the opinion of the court, remarks: "When it is said, that the assignment of a negotiable security overdue shall not deprive the defendant of any considerations, which might have been favorable to him, if the action had been brought by the original holder, it is meant, that such facts as would show that the security, at the time of the assignment, had become invalid in the hands of the original holder, should equally avail the defendant against the assignee." *Nevins v. Townsend*, 6 Conn. 193; *Johnson v. Bridge*, 6 Cow. 693; *Bridge v. Johnson*, in error, 1 Wend. 842.

It is true, however, that in the state of New York, and perhaps in some other states, a different practice has formerly prevailed; though it is believed that a different doctrine had no

been deliberately established. A careful examination of the cases alluded to in the state of New York, will show that the question now under consideration was not, in those cases, discussed at the bar; and it may be, therefore, respectfully presumed, that it was not distinctly adjudged by the court: *Hendricks v. Judah*, 1 Johns. 319; *O'Callighan v. Sawyer*, 5 Id. 118; *Bank of Niagara v. McCracken*, 18 Id. 493; *Ford v. Stuart*, 19 Id. 342. In these cases, the principle seems to be assumed, that as between the original parties, a set-off is a defense to the note itself, and therefore must be permitted to be made after the transfer; but on the contrary, the set-off admits the validity of the note, recognizes it as a subsisting debt, and asks only that the plaintiff shall receive in payment debts due from himself instead of cash.

The judge at the trial, therefore, was justified in refusing to charge the jury that the sum paid by the defendant to Patten and Russell, at the time and under the circumstances before mentioned, could be allowed as a set-off against the note in suit in the hands of the plaintiff, an innocent indorsee. And for the same reasons, a set-off of the sum of one hundred and nineteen dollars and fifty cents, mentioned in a schedule to Moore's receipt as being due on the twenty-fifth of June, 1829, was properly disallowed.

But the judge further instructed the jury, with respect to the two sums of two hundred and ninety dollars and fifty-eight cents each, that if they should find the value of the defendant's share in said copartnership stock was ascertained, and that there was an agreement between the defendant and Moore, that the amount thereof should be applied to said note at the times mentioned in the indenture between them, and which, it is agreed, was long before the indorsement of the note to the plaintiff, that it was their duty to make such application. In this direction, also, the judge was justified by the principles now recognized. That agreement was made when the note remained in the hands of the original holder; it was not in conflict with the rights of any one else; it had reference to the note, and to the manner and means of its payment; and it was, in truth, an equity between the parties which "attached on the note itself."

The plaintiff, on the trial, for the purpose of showing that the note in controversy was indorsed to him at an earlier period than the defendant supposed, claimed that the legal presumption was, that it was transferred immediately after Moore indorsed upon it the payment of one hundred and forty-two dol-

lars and twenty-seven cents, which was on the tenth of April, 1828. This fact furnished no other evidence on the subject than that the note had not then been assigned to the plaintiff. It certainly could furnish none as to what time after it was so assigned; for neither the payment of that note nor its application upon the note, had any connection with the subsequent act of transfer; and no legal presumption of a fraud of the nature claimed could arise from it.

I am of the opinion that the judge was correct, in every thing assumed by him, and do not advise a new trial.

The other judges were of the same opinion. Peters, J., however, remarked that he had thought the law otherwise unless he saw the case of *Burrough v. Moss et al.*, 10 Barn. & Cresswell. New trial not to be granted.

OVERDUE NOTE, INDORSEE TAKES SUBJECT TO WHAT EQUITIES.—*See Southgate*, 16 Am. Dec. 409. The doctrine of the principal case, that the indorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and not to claims arising out of collateral matters, is well established in *Fairchild v. Brown*, 11 Conn. 39; *Bigelow v. Lawrence*, 16 Id. 412; *Culver v. Parish*, 21 Id. 412, where this illustration of the principle is given: "Thus, if a debt be due from the payee to the maker, it can not be set off against the note in a suit by the indorsees;" *Eastern Bank v. Capron*, 642; *Goodrich v. Stanley*, 23 Id. 84; in *Fitch v. Gates*, 39 Id. 369, where the principal case is cited in the court's discussion of the right of set-off to negotiable notes.

CHAPIN v. PEASE.

[10 CONNECTICUT, 69.]

CONVEYANCE INTENDED TO DEFRAUD CREDITORS is fraudulent and void as to them, but valid as between the parties, and neither at law nor in equity can the grantee be compelled to reconvey.

RECONVEYANCE BY A FRAUDULENT GRANTEE to his grantor, such reconveyance being voluntary, and made while the party is in failing circumstances, is void as to his creditors.

A CREDITOR OF A FRAUDULENT GRANTOR is not estopped to show the deed under which the grantor held was not given as security merely, but was given to defraud creditors, and was therefore binding as between the parties.

DECLARATIONS OF GRANTEE, under whom the plaintiff in ejectment claimed, made in the presence of the plaintiff, that the deed was not an absolute conveyance, but made as security merely, are not admissible, the grantor himself being present and a competent witness.

EJECTMENT. Both parties claimed under Barnabas Pease, the plaintiff by virtue of a levy of an execution December 12, 1828.

the defendant, Moses Pease, under a deed from Barnabas, dated October 21, 1828. The controversy turned upon the validity of the deed of 1828. The plaintiff claimed that the deed was voluntary and in fraud of Barnabas' creditors, of whom the plaintiff was one. The defendant admitted that the deed was voluntary, but claimed that it was made in pursuance of a deed and defeasance executed from the defendant to Barnabas in 1817 to secure him in certain indorsements; that the deed and defeasance were *bona fide*, and the deed duly recorded. In reply the plaintiff urged that the defeasance was but recently executed; that the deed of 1817 was absolute and fraudulently made to defraud Moses' creditors, and was binding between the parties. It was admitted that Barnabas was much in debt when he conveyed to the defendant, and failed four days afterwards. On the trial the defendant offered a witness to testify to a conversation between Barnabas and the plaintiff in 1828, in which the former told the latter that the deed of 1817 was executed in the manner as claimed by the defendant. Barnabas was then in court and a competent witness. The court rejected the testimony.

Verdict for the plaintiff. Motion for a new trial.

W. W. Ellsworth and Toucey, in support of the motion.

Hungerford, contra. The deed of 1817 was absolutely void as against creditors, but binding between the parties: Stat. 247, tit. 40, sec. 1; *Starkie v. Littlepage*, 4 Munf. 368; *Chamberlayne v. Temple*, 2 Id. 348. And the property therefore belonged to Barnabas.

Bissell, J. The first question arises upon the correctness of the charge. And here it should be remarked, that it stands admitted on the motion, that the conveyance from Barnabas Pease to Moses Pease, the defendant, was entirely voluntary. This, in connection with the fact of Barnabas Pease's insolvency and the claims of the conflicting parties, is to be taken into view, in considering this question. If this be done, it seems to me that the charge is sustainable upon the plainest and most obvious principles.

The conveyance from the defendant to Barnabas Pease, in 1817, being intended to defraud the creditors of the former, was void as to them, but good as between the parties: Stat. 247, tit. 40, sec. 1; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Parker v. Proctor*, 9 Id. 390; *Reade v. Livingston*, 3 Johns. Ch. 500 [8 Am. Dec. 520]; *Benton v. Jones*, 8 Conn. 186. Neither at law nor in

chancery could Barnabas Pease be compelled to reconvey. As between the parties the conveyance stood on the same ground, as if a full and adequate consideration had been paid. Whether the conveyance was thus fraudulent was distinctly put to the jury; and they have answered the question. As against everybody, then, but the creditors of his grantor, Barnabas Pease had a valid title. The record title was in him; and for a period of eleven years, and up to the time of his insolvency, he was held out to the world as the owner of the property.

Under these circumstances the conveyance from Barnabas to Moses Pease, being voluntary, was fraudulent and void as to the creditors of the former: *Sexton v. Wheaton*, 8 Wheat. 229; *Reade v. Livingston*, 3 Johns. Ch. 500 [8 Am. Dec. 520]. But it has been contended that it was not competent for the plaintiff to insist that the conveyance of 1817 was fraudulent, as he was thereby impeaching his own title. There is much more of plausibility than of soundness in this objection. It is an undoubted principle that a plaintiff can not be permitted to impeach the title under which he claims. But a slight attention to the facts will evince that the principle has no application to the case. To entitle the plaintiff to recover, it was only necessary for him to remove out of the way the deed of 1828, which had been interposed by the defendant. This he does, by showing it to be voluntary. Unexplained, this is conclusive; and a case is thus made out for the defendant to answer. He attempts to do so by setting up the facts detailed in the motion. May not the plaintiff show these facts to be untrue, and that these claims of the defendant are unfounded? And is it to be seriously urged, that in doing this, he is impeaching the title under which he claims?

Again: It is objected, that the plaintiff can not recover, inasmuch as upon the grounds assumed in the charge, and upon which the jury have given their verdict, the property has ever been open to the creditors of Moses Pease. And it has been asked, were they to levy upon it as his estate, would they not hold as against this plaintiff? It will be time enough to settle that question when it arises. But it may well be asked, whether it is for the defendant to interpose this objection? Is it for him to say, the jury have found that I made a conveyance to defraud my creditors, and as the conveyance is void as to them, therefore a creditor of my fraudulent grantee may not recover as against me? It is exceedingly obvious, that the same objection might have been urged, had Barnabas Pease never re-

conveyed, and the title had been outstanding in him at the time of the plaintiff's levy. I see no reason for granting a new trial, on the ground that the case was not properly submitted to the jury.

The only remaining question is, whether the declarations of Barnabas Pease, offered in evidence, were properly rejected. The evidence is obnoxious to two objections, either of which is conclusive. In the first place, it is irrelevant. It was offered for two purposes: 1. As conducing to show, that the writing of defeasance was executed simultaneously with the deed; and 2, to show that the plaintiff had notice of that fact. Of what importance, it may be asked, is the fact itself? The jury have found that the deed was made with a fraudulent intent, and was void as to creditors. Is the reproach of fraud removed by showing that a defeasance was executed at the same time? And if the fact were unimportant, it follows that notice of it to the plaintiff was equally so. Besides, the conversation took place long after the plaintiff's debt had accrued; and even if the fact were of any consequence, the notice was entirely nugatory.

But secondly, admitting the testimony to be relevant, still it was open to all the objections against hearsay evidence. Barnabas Pease was a competent witness, and, as the motion shows, testified in the cause. Why not prove the execution of the defeasance by him? Why should his declarations, not under oath, be received for that purpose? The evidence, it should be remembered, was not offered for the purpose of confirming the witness, as to any fact to which he had sworn, but for the purpose of proving a fact which the party deemed important. In this point of view, the testimony was clearly inadmissible, and the rule must be discharged.

The other judges were of the same opinion.

New trial not to be granted.

VOLUNTARY CONVEYANCES.—This subject is discussed in the note to *Jenkins v. Clement*, 14 Am. Dec. 703; and in *Hudnal v. Wilder*, 18 Id. 755, and note; *Dawson v. Dawson*, 18 Id. 573; *Tolar v. Tolar*, Id. 598; *Cosby v. Ross' Adm'r*, 20 Id. 140; and in *Anderson v. Green*, 23 Id. 417, and note, in regard to the specific execution of a voluntary agreement.

FRAUDULENT CONVEYANCE not helped by the fact that it was given for a just debt: *Lowry v. Pinson*, 23 Id. 140.

FRAUDULENT CONVEYANCES ARE VOID as to creditors, but valid as to the parties: See *Carlton v. King*, 23 Id. 295; *Johnston v. Harvey*, 21 Id. 426; *Liles v. McCullough*, 12 Id. 519; *Reichart v. Custator*, 6 Id. 402; *Peaslee v. Barney*, Id. 743.

Cited among other cases in support of the position taken in *Owen v. Dixon*, 17 Conn. 499, that the lien of an attachment will be discharged if any of the steps pointed out by the statute in regard to the judgment and execution are omitted.

COWLES v. WHITMAN.

[10 CONN. REPORTS, 121.]

THE ALLOWANCE OR DISALLOWANCE OF COSTS in suits in chancery is discretionary with the court.

TESTIMONY OF PARTY TO A SUIT, given voluntarily and against his interest, is admissible.

BILL FOR THE SPECIFIC EXECUTION of a contract relating to chattels merely, does not lie where adequate remedy lies at law.

IDEM.—Where one buys shares in the name of another, a bill against the administrator of that other for the transfer of these shares will lie, it being a case of trust.

IT IS NO DEFENSE TO A BILL TO ENFORCE A TRUST that the complainant is indebted to the estate of the *cestui que trust*, as such indebtedness is to be adjusted by the court of probate. Nor is it a defense that a decree enforcing the trust would take the subject-matter thereof out of the jurisdiction of the probate court, as it always was in equity, and should not be distributed in the administration of the estate.

BILL in chancery brought by Solomon and Edward Whitman to obtain from Lemuel Whitman, administrator of Lemira Whitman, deceased, a transfer of five shares of the capital stock of the Middlesex County Bank standing in her name. The facts appear from the opinion. Decree for the plaintiff, and error taken to this court.

Toucey, for the plaintiffs in error. Bill for specific performance relative to personalty will not lie: *Cud v. Butler*, 1 P. Wms. 570; *Nutbrown v. Thornton*, 10 Ves. 161; *Mason v. Armistage*, 13 Id. 37; *Dorison v. Westbrook*, 5 Vin. Abr. 510; 1 Madd. Ch. 402. The decree takes personal property out of the jurisdiction of the probate court: *Pilkin v. Pilkin*, 7 Conn. 307 [18 Am. Dec. 111]; *Bailey v. Strong*, 8 Id. 278; *Beach v. Norton*, 9 Id. 182, 196.

Hungerford and J. Griswold, contra. This was a trust of which it was the appropriate province of a court of chancery to enforce the execution: *Jackson d. Kane v. Sternbergh*, 1 Johns. Cas. 153; *Foot v. Colrin*, 3 Johns. 216, 221 [3 Am. Dec. 478]; *Jackson d. Benson v. Matsdorf*, 11 Id. 91 [6 Am. Dec. 355]; *Jackson d. Seelye v. Morse*, 16 Id. 197; *Boyd v. McLean*, 1 Johns. Ch. 582; *Botsford v. Burr*, 2 Id. 405; *Wray v. Steele*, 2 Ves. & Bea. 388; 1 Swift Dig. 285; *Mechanics' Bank v. Seaton*. 1 Pet. 305.

DAGGETT, C. J. Among the errors assigned are two, which have been very properly abandoned by the counsel for the defendants below. First, that costs were taxed against them. Surely, such a question can not be made in this court; as it is entirely discretionary, according to the course of the court, to allow or disallow costs.

Another ground of error alleged is, that the court admitted the testimony of Nancy Whitman, one of the defendants. This testimony, it appears, was given voluntarily on her part, and against her interest. This objection, like the other, is quite unfounded; and as it has not been pressed, no further remark is necessary: *Norden v. Williamson et al.*, 1 Taunt. 378.

But it is contended that a bill will not lie for the specific execution of a contract relating to personal chattels merely, because there is adequate remedy at law; and for this position several cases are cited, and many more might be cited. As a general rule it is true. As contracts for the delivery of corn, flour, stock in banks or in the funds, and the like, may be compensated by damages, courts of equity will leave the parties to their remedy at law: *Buxton v. Lister et al.*, 3 Atk. 383; 2 Swift Dig. 17. There can be no difference between these five shares of bank stock and any other like number.

The facts, however, on which the decree rests, present no such point. They are in substance as follows: That it was mutually understood and agreed between the plaintiffs and Lemira, that five shares of the capital stock in the bank should be subscribed for, by them, in her name, and that if more stock should be distributed to her than she could pay for, all the shares beyond what she could pay for should be taken and paid for by the plaintiffs, and should belong to them. Five shares were subscribed for by them, in her name, and their funds advanced therefor. After these shares were thus taken, she declared her inability to pay for them or any part thereof; and insisted that they should take them and pay for them; to which they assented.

I discern here no sale of the stock, nor any contract or agreement to transfer it. None of the cases cited therefore apply. On the contrary, I perceive a trust created within the principles always applicable to this subject. Money is here paid by the plaintiffs for stock; and this stock, by her direction, stands in her name. They are the owners in equity; she is the owner at law. They now seek an execution of this trust; and this by all the rules relating to trusts comes within the peculiar province

of a court of equity. Fraud, accident, and trust are said to be the *peculium* of a court of chancery.

It is, however, again insisted that it appears from the record that the plaintiffs are and were indebted to the estate of Lemira in a greater sum than the value of the stock; and therefore it would be inequitable to take this stock out of the hands of the administrator until this debt shall have been paid. The objection is founded upon a misconception of the facts found by the court. The court does not find any indebtedness at all. On the contrary, it says "it doth not appertain to this court to inquire into the condition of the accounts between the plaintiffs and Lemira, or her administrator; there being no suggestion or proof that the plaintiffs are not responsible men." This objection admits that there are claims of Lemira's administrator against the plaintiffs. What then? To the court of probate, where that estate is now in settlement, belongs the adjustment of all such claims; and only by appeal therefrom is the superior court authorized to hold jurisdiction over them, as will be further shown in the consideration of the remaining error assigned. Besides, the decree proceeds on the ground that this bank stock never did belong in equity to Lemira, but at all times to the plaintiffs.

Again it is alleged, as a ground of error, that this decree takes these bank shares out of the hands of the administrator, and out of the jurisdiction of the court of probate. Be it so. If the shares were never her property, but always belonged in equity to the plaintiffs, as is supposed above, the court of probate ought not to hold them for the payment of debts or for distribution among the heirs. What if a deed of a farm or land had been taken in her name, and paid for by the plaintiffs; could it have been successfully contended that the heirs and administrator could not have been compelled to execute a conveyance, because the property would thereby be taken from the heirs and creditors? or because it was inventoried in the court of probate?

Cases are cited from 7 Conn. 307; 8 Id. 278, and 9 Id. 196, to prove that the settlement of cases before the court of probate can not be drawn, by bill in equity, into the superior court. I fully recognize the principles of those decisions, but do not perceive their bearing on this decree, except strongly to support it. They do sustain the decree against the objection that the claims of Lemira's administrator on these plaintiffs could be taken into consideration by the superior court, because they are

cognizable by the court of probate, and must there be decided. This, as will be found, is the point in all those decisions.

But it is urged that the question made in the superior court respecting the right to a transfer of those shares, should have been made before the court of probate. On what ground can this be urged? Can a court of probate order a transfer of property by the heir or administrator? Could it order a transfer of these shares? If so, how could it enforce the order? No such power is possessed by a court of probate; nor is it believed that it has ever been exercised. In the case of *Beach v. Norton et al.*, 9 Conn. 196, one of the cases cited by the plaintiffs in error, it is said by the judge who delivered the opinion of the court: "I do not mean to lay down the position that the aid of a court of chancery can never be properly sought in relation to an estate in settlement before the court of probate. Such aid may be wanted perhaps in certain cases; and a judgment of a court of probate may thereby be affected."

Upon the whole, I consider this case free from difficulty. The decree must therefore be affirmed.

The other judges were of the same opinion.

Decree affirmed.

PARTY TO A SUIT MAY BE A WITNESS when voluntarily appearing against his own interest: *Johnson v. Blackman*, 11 Conn. 347; *Woodruff v. Westcott*, 12 Id. 137; *Butler v. Elliott*, 15 Id. 205; *Beecher v. Buckingham*, 18 Id. 119.

Followed in *Brush v. Button*, 36 Id. 294, that an executor's account can be settled only by the probate court.

CASES
IN THE
SUPERIOR COURT AND COURT OF
ERRORS AND APPEALS
OF
DELAWARE.

FOOKS v. WAPLES.

[1 HARRINGTON, 131.]

TO RENDER ONE LIABLE FOR FALSE REPRESENTATIONS as to another's solvency, it is necessary to prove that he knew of the insolvency, and that he made the representation with intent to deceive.

CAPIAS case. Narr. Plea, not guilty. The action was brought against Waples for falsely recommending one T. E. Waggoman to be a person fit to be trusted. It appeared that in May, 1830, a stranger presented himself to the plaintiff with the following letter of introduction;

“MILLSBOROUGH, Del., May 13, 1830.

“MR. BENJAMIN FOOKS:

“DEAR SIR—Allow me to introduce to you Mr. Waggoman, of the city of Washington, as a gentleman in whom you may rely. I do not hesitate to say that Mr. Waggoman will promptly comply with any engagements that he may enter into with you. He will explain to you the nature of his calling on you, etc. Any attention you can give him will be thankfully received by your friend, etc.

“WM. D. WAPLES.”

Fooks was a gig and harness maker, and relying on this recommendation, sold to Waggoman a gig and harness, taking his note therefor. Waggoman was insolvent in 1830, and generally known to be so in Washington, though at one time he was rich. He is now dead, and Fooks has endeavored unsuccessfully to collect the note. Motion for a nonsuit.

Cullen, Frame, and Clayton, for the defendant, in support of

the motion. Plaintiff has failed to establish the identity of the person to whom the goods were sold with the T. E. Waggoman referred to in the letter, nor has any evidence been given of the defendant's knowledge of the insolvency, and of his fraudulent intent: 1 Selw. N. P. 483; Salk. 211; 2 Chit. Pl. 317; 2 Saund. Pl. and Ev. 527.

E. Woollen, and J. A. Bayard, contra. It is a fraud to speak positively regarding a matter of which the person is not fully cognizant.

By COURT. In this case it was incumbent on the plaintiff to prove that the defendant made a false representation of the solvency of Waggoman, knowing it to be false, and with intent to deceive and defraud the plaintiff. The knowledge must be proved. It has been argued that the fact of the recommendation proves a knowledge of the circumstances. We can't agree to this conclusion. It is at best but a mere inference, and too unsubstantial as a foundation for the fraud that is to be built upon it. The *scienter* ought to be proved *aliunde*. The evidence in the cause is that Waples lived in this county, and Waggoman in Washington city. Some of the depositions of witnesses residing in Washington, hesitate about Waggoman's insolvency in 1830, though the proof does establish this; yet there is not a tittle of evidence produced to show that Waples knew Waggoman's circumstances either real or apparent. It being incumbent on the plaintiff to prove this knowledge, he must be nonsuited.

Judgment of nonsuit.

FALSELY AND FRAUDULENTLY REPRESENTING one who is insolvent to be of good credit is actionable: *Patten v. Gurney*, 9 Am. Dec. 141; *Upton v. Vail*, 5 Id. 210 and note.

RICHARDSON v. CARR.

[1 HARRINGTON, 142.]

FOR UNNECESSARY VIOLENCE TO CATTLE FOUND TRESPASSING, a person is liable.

APPEAL from a decision of a justice of the peace in an action of trespass for so worrying a cow with dogs that she died. It appeared that the plaintiff's cow had been trespassing on the defendant's close, that the latter stoned her and set dogs upon her; but there was some doubt whether she died from this treatment or from a surfeit in eating corn.

Hamilton, for the appellant.

Wales, *contra*.

The Court charged the jury that if a cow be found trespassing on another's property, the owner of the property may impound her, or sue for damages, or drive her out; but in driving her out he must use only necessary violence, or he becomes himself a trespasser and liable in damages to the owner of the cow. If the defendant in this case beat the plaintiff's cow and mangled her with dogs, as he is charged, he is a trespasser, though the cow was in his cornfield; and the plaintiff ought to have damages to the value of the cow, if her death was occasioned by his act; and if not, to the amount of the injury. If, however, in turning her out of his field he used only the necessary force, and her death arose from other cause, the defendant ought to have a verdict.

Verdict for appellant, defendant below.

REMEDY WHERE CATTLE DO DAMAGE ON ANOTHER'S LAND.—See *Holladay v. Marsh*, 20 Am. Dec. 678; *Mooney v. Maynard*, 18 Id. 699; *Orser v. Storms*, Id. 543.

NEWLIN v. DUNCAN.

[1 HARRINGTON, 204.]

PAYMENT OF A PART OF A DEBT is evidence of a promise to pay the remainder, so as to prevent the operation of the statute of limitations as a bar.

AN ACKNOWLEDGMENT OF A SUBSISTING DEMAND, or any recognition of an existing debt, is evidence of a promise to pay it.

AN ACKNOWLEDGMENT REBUTS THE PRESUMPTION OF PAYMENT arising from lapse of time.

A SUBSEQUENT ACKNOWLEDGMENT REVIVES THE OLD DEBT, and does not create a new one.

AN ACKNOWLEDGMENT MADE AFTER ACTION BROUGHT prevents the bar of the statute.

A PAROL ACKNOWLEDGMENT is sufficient to revive a liability on a contract reduced to writing.

THE ACTION SHOULD BE ON THE OLD DEBT, not on the new promise.

QUESTIONS of law were reserved by the superior court for the consideration of the court of errors and appeals. The action was brought by Duncan against the surviving partner of Newlin and Woollaston, on a note given by them as partners, dated October 13, 1823. On the books of the firm were credits: July 3, 1826, one hundred dollars, on account of the note; May 7, 1827, interest up to date; December 31, 1827, interest up to

date. The questions submitted were: Whether the entries in a partnership book, made by a deceased partner, are a sufficient acknowledgment of a subsisting demand to take the case out of the statute of limitations, so as to charge a surviving partner in an action against him brought on a note more than six years after it is due; and whether such entries being made more than three years before action brought will prevent the operation of the act as a bar, when pleaded.

Bayard, for the defendant below.

Hamilton, *contra*.

By Court, CLAYTON, C. J. This action was commenced on the first of May, 1832, on a promissory note dated thirteenth of October, 1823, for four hundred and four dollars. On the third of July, 1826, the defendants paid in part satisfaction of this note one hundred dollars, and on the thirty-first of December, 1827, the interest remaining due upon the note was paid. The defendant pleads and relies on the statute of limitations as a bar, because the last of these payments was made more than three years before the commencement of the action; that three years is the period of limitation from the time of the last payment, and not six; the old cause of action (the promissory note), not being revived by the subsequent acknowledgment, the plaintiff should have proceeded on the new promise, the old cause of action being the consideration only of the new promise.

It is not disputed in this case that a payment of a part of the debt is evidence of a promise to pay the remainder, so as to prevent the operation of the statute as a bar. Indeed, it is now well settled, and has been for more than one hundred years past, that an acknowledgment of a subsisting demand, or any recognition of an existing debt, is evidence of a promise to pay it. The courts in England, from the decision in *Heyling v. Hastings*, in 1698, to the case of *Acourt v. Cross*, in 1825, have maintained that the ground on which the statute proceeds is, that after a certain time it shall be presumed that a debt has been discharged. An acknowledgment rebuts that presumption, and then the plaintiff recovers, not on the ground of having a new right of action, but that the statute does not apply to bar the old one. This is the language of the judges in *Thornton v. Illingsworth*, 2 Barn. & Cress. 824, decided in the year 1824. So in the case of *Perham v. Raynall and others*, 2 Bing. 305. Chief Justice Best says the presumption certainly is that 'he

debt, if any, has been paid. But the presumption may be rebutted, and is rebutted by a subsequent acknowledgment. From the decision of *Heyling v. Hastings*, 1698, down to the present time, 1824, it has always been holden that a new promise revives the old debt, but does not create a new one. It is true this same judge in the year following, 1825, seems to have changed his opinion in this respect, and says: "It seems to me that the plaintiff should have been required to declare specially on the new promise, and ought not to have been permitted to revive his original cause of action: *Acourt v. Cross*, 3 Bing. 329. In the case of *Tanner v. Smart*, 6 Barn. & Cress. 603, decided in 1827, it is to be collected from the whole case that this latter opinion of Chief Justice Best is not recognized to be law; for there the original cause of action was declared on, and the only doubt in the case was, whether the acknowledgment was such a one as amounted to a promise to pay the debt.

In addition to this we have the uniform decisions of the courts of this state as far back as the memory of the oldest lawyer extends. They have considered the subsequent acknowledgment as reviving the old debt, and not creating a new one. They have in effect treated it as many of the English decisions do, as a waiver of the statute. It has often been decided here, as well as in England, that an acknowledgment made after action brought prevented the bar, and this evidence could only have been received on the ground that the old debt was revived; the new promise which is spoken of being subsequent to the commencement of the action could not sustain it. So it has been decided that an acknowledgment by parol is sufficient evidence to revive the defendant's liability on a contract reduced to writing in pursuance of the statute of frauds; the court saying that a written acknowledgment was not necessary in such a case, because the defendant's liability was fixed by the original promise in writing, and the acknowledgment within six years was only to show that such liability had not been discharged: 1 Barn. & Ald. 690. The practice of declaring by an executor upon a promise to him as such to pay the debt of the testator was much urged at the bar. In that case, no doubt, you must declare on the new promise, for every promise to be binding must be made by a person competent to make it, and to a person in existence to receive it: 6 Taunt. 310; 13 Com. Law Rep. 88. Besides, if the executor were to declare on the original promise to the testator, and to the plea of the statute of limitations were to reply

the promise made to himself, it would be a manifest departure in pleading, and a good ground for a demurrer. But who ever saw, as between the original parties, a declaration on the new promise? Has such a case occurred either in England or in this state? We are not aware of such case

It is not to be denied that the later decisions in England on the statute of limitations have left the law in a confused and unsettled state. Indeed, it is difficult to say what is the law at this time on the subject. It is certainly not settled, and seems to vary according to the caprice of the judge who tries the cause. If the old debt is extinguished, and you must proceed on the new promise, what is the consideration of that promise? Certainly there is no legal obligation to pay a debt extinguished by statute. Chief Justice Best, who seems to have taken the lead on this subject in *Accourt v. Cross*, takes occasion to say that it is unchristian to compel a man to pay a debt barred by the statute, and he repeats the observation in another case. If it is unchristian to compel one to pay such a debt, there can not be even a moral obligation to pay it. And yet this latter is the only ground on which the consideration for the new promise is attempted to be supported by those who say that the old debt is not revived by the subsequent acknowledgment. But it has never yet been determined that a mere moral obligation is a sufficient consideration to raise an implied promise: 1 Wheat. Selw. 42. In such case there must be an express promise to be binding on the party. Such is the case of one who contracts a debt during infancy, and promises after his arrival at full age to pay it. So in the case of bankruptcy and insolvency. In such cases the law will not imply a promise from the mere acknowledgment of the debt, there must be an express promise to pay. And if the statute of limitations extinguishes the debt, and the subsequent acknowledgment does not revive it, there would be no legal consideration; it would at most be a mere moral obligation from which the law would not imply a promise to pay, and would not compel one to pay unless he had expressly promised. No one doubts that the naked acknowledgment of a subsisting demand takes the case out of the statute. This has never been denied. If it be so, and no express promise be necessary, you are not to proceed on the new promise, but upon the old debt, the remedy which was suspended being restored by the acknowledgment.

Since the late decisions in England to which we have referred, our statutes of limitation have all been revised, and none

of the new principles attempted to be established by those decisions are introduced into our statute. Taking the law to be thus, that the acknowledgment of a subsisting demand revives the old debt and does not create a new obligation, it follows in this case, where the demand is on a promissory note, that the period of limitation is six years, and not three, therefore that the plaintiff is not barred.

It is not necessary to decide the other question presented to the court; the decision of this question being conclusive against the defendant.

The court directed this entry: And now, to wit, this thirty-first day of October, A. D. 1833, this cause having been heard at the last term of this court, and the same having been debated by counsel on both sides; and the court having held the same under consideration until this time, it is thereupon considered and adjudged by the court that the claim of the said John Duncan, the plaintiff, is not barred by the act of limitations aforesaid, and that the entries aforesaid in the books of Newlin and Woollaston, being all made more than three and within six years before the bringing of this action, had the effect in law of preventing the said act of assembly from being a bar to the recovery of the said promissory note declared on in this action. And it is further considered and adjudged by the court that the said John Duncan, the plaintiff, ought to recover in his said action; and it is further considered, adjudged, and ordered by the court that the record be remanded to the court below, and that the said Thomas S. Newlin, the defendant, pay the costs in this court.

ACKNOWLEDGMENT TO REVIVE DEBT.—See the references in the note to *Austin v. Bostwick*, *ante*, 42.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

LINN v. STATE BANK OF ILLINOIS.

[1 SCAMMON, 87.]

THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES determining that the statute of a state violates the Constitution of the United States, must be followed by the state courts.

TO EMIT BILLS OF CREDIT is to issue paper redeemable at some future day, and intended to circulate as money.

THE CERTIFICATES OF THE STATE BANK OF ILLINOIS were bills of credit and within the prohibition of the Constitution of the United States, although they are not made a legal tender by statute.

A PROMISE MADE IN CONSIDERATION OF AN ACT FORBIDDEN BY LAW is void.

A NOTE GIVEN IN CONSIDERATION OF BILLS OF CREDIT, or loan-office certificates received by the maker, is void. *Snyder v. State Bank*, 1 Breese, 122, overruled.

DEBT on a sealed note, by defendant in error, against the plaintiff, in which the declaration was in the usual form. The facts and pleas are sufficiently stated in the opinion of the court.

S. Breese and D. J. Baker, for the plaintiffs in error.

J. Semple, attorney-general, for the defendants in error, contended: 1. That the court had no power to disregard and declare void a statute. 2. That the statute in question was not repugnant to the constitution of the state nor of the United States. 3. Even if the law be void, the contract founded on it is valid.

By Court, **LOCKWOOD, J.** This is an action of debt, brought on a sealed note, executed by Wm. Linn to the plaintiffs below. The defendant in the court below, pleaded that the writing

obligatory was sealed and delivered by him to the plaintiffs for and in consideration of bills issued and emitted by the plaintiffs, under and by virtue of an act of the legislature of the state of Illinois, entitled "An act establishing the State Bank of Illinois," and that the emitting and issuing said bills by said bank, under and by authority of said act, was a violation of the tenth section of the first article of the constitution of the United States, which forbids a state to "emit bills of credit."

To these pleas the plaintiffs below demurred, and judgment was given in the circuit court in favor of the bank. To reverse this judgment the defendant below has brought a writ of error to this court.

The main question presented by this case, for the consideration of this court, is, whether the act establishing the State Bank, so far as said act authorized the issuing of the bank bills which formed the consideration of the sealed note sued on, is a violation of the constitution of the United States. To support the position that the issuing the bank bills mentioned in the plea, is a violation of the constitution of the United States, the counsel for the plaintiff in error cited the case decided in the supreme court of the United States, of *Craig et. al. v. The State of Missouri*, 4 Pet. 410.

The court recognizes the correctness of the doctrine that the supreme court of the United States is the proper and constitutional forum to decide and finally to determine all suits where is drawn in question "the validity of a statute of, or an authority exercised under any state, on the ground of its being repugnant to the constitution, treatise, or laws of the United States, and the decision is in favor of such validity."

The decision of the demurrer in the court below necessarily drew in question the validity of the statute establishing the State Bank of Illinois; and that decision, being in favor of its validity, brings this cause within the doctrine above acknowledged. And although the question involved in this case is of immense importance to the people of this state, and affects interests of great magnitude, yet the duty that devolves on this court is a very plain one. It is simply to ascertain what the supreme court of the United States has decided in an analogous case, and then decide in accordance with the decision of that court. When the supreme court of the United States have decided that a state law violates the constitution of the United States, the judges of the respective states have no right to overrule or impugn such decision. State judges are sworn to sup-

port the constitution of the United States, and that instrument in its sixth article declares that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

As then this court is bound to conform its decisions on questions relative to the unconstitutionality of state laws, to the decisions of the supreme judicial tribunal of the nation, it becomes necessary to ascertain what that court has decided in the case of *Craig et al. v. The State of Missouri*. Chief Justice Marshall, who delivered the opinion of the majority of the court, investigates the questions, "What is a bill of credit?" and "What did the constitution mean to forbid?" in his usual lucid and forcible manner. He says that a bill of credit "in its enlarged and perhaps literal sense, may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit,' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood. At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium, was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning, and 'bills of credit' signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually

changing, and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt throughout the United States, and which deeply affected the interest and prosperity of all, the people declared in their constitution, that 'no state shall emit bills of credit.' If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a state government, for the purpose of common circulation.

"What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the state are to be issued by those officers to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office of the state of Missouri, in discharge of taxes or debts due to the state.

"The law makes them receivable in discharge of all taxes or debts due to the state, or any county or town therein, and of all salaries and fees of office, to all officers, civil and military, within the state, and for salt sold by lessees of the public salt works. It also pledges the faith and funds of the state for their redemption. It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denomination of the bills from ten dollars to fifty cents fitted them for the purpose of ordinary circulation; and their reception in payment of taxes and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation; that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one tenth of them from circulation. Had they been termed 'bills of credit' instead of certificates, nothing would have been wanting to bring them within the prohibitory words of the constitution.

"And can this make any real difference? Is the proposition to be maintained that the constitution meant to prohibit names and not things? That a very important act, big with great

and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We can not think so. We think the certificates emitted under the authority of this act, are as entirely 'bills of credit' as if they had been so denominated in the act itself.

"But it is contended that though these certificates should be deemed 'bills of credit,' according to the common acceptation of the term, they are not so in the sense of the constitution, because they are not made a legal tender."

"The constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all 'bills of credit,' not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the constitution contains a substantive prohibition to the enactment of tender laws. The constitution therefore considers the emission of 'bills of credit' and the enactment of tender laws, as distinct operations, independent of each other, which may separately be performed. Both are forbidden. To sustain the one because it is not also the other; to say that 'bills of credit' may be emitted, if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this."

"The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender; and that therefore the general words of the constitution may be restrained to a particular intent." "Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either that being made a tender in payment of debts is an essential quality of 'bills of credit,' or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition."

The Chief Justice, after giving several examples taken from the history of the United States, and several of its members of issues of paper money, some of which were made a tender in payment of debts, and others not, and showing the evils that resulted to the country from their emission, and that the evils with which their emission was fraught did not depend upon their being made a legal tender, and contending that all these issues of paper money were alike "bills of credit," comes to the conclusion that the certificates issued by the loan office in Missouri were "bills of credit," in the sense of the constitution, and consequently their emission was forbidden by that instrument. The Chief Justice then inquires, "Is the note executed by Craig, valid, the consideration of which consisted in lending to him of these loan-office certificates?" He says: "It has been long settled that a promise made in consideration of an act forbidden by law, is void. It will not be questioned, that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now, the constitution of the United States forbids a state to 'emit bills of credit.' The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices; but the issuing of them, the putting them into circulation, which is the act of emission; the act that is forbidden in the constitution. The consideration of this note is the emission of bills of credit by the state.

"The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the constitution of the United States." The chief justice, after citing a number of decisions to show that bonds and notes given on illegal considerations are void, says that "a majority of the court feel constrained to say, that the consideration on which the note in this case (the case of *Craig v. The State of Missouri*), was given, is against the highest law of the land, and that the note itself is utterly void."

Having thus ascertained what the Supreme Court of the United States has decided in the case referred to, the question here arises: Is there such a difference between the certificates issued by the loan office in Missouri, and the bills issued by the bank established in this state, as to exempt these bills from being considered "bills of credit," within the meaning of the constitution of the United States?

A concise review of a few of the provisions of the "Act estab-

lishing the State Bank of Illinois," will show a very close and striking resemblance. The bank was to be owned by the state. The cashiers were to give bond with security for the use of the state, for the faithful discharge of the duties of their office. The bank was to issue notes or bills to the amount of three hundred thousand dollars, in bills not exceeding twenty dollars, nor less than one dollar, and their form is prescribed. They were to bear two per cent. interest, and to contain a promise to pay.

The bills thus to be issued were to be receivable at all times for debts due the state, or to any county, or to the bank. The two hundred thousand dollars of bills, as soon as they could be prepared for "Missouri," were to be loaned to citizens of the state, and the loans were to be made in the different counties according to the population. All the revenues, lands, town lots, funds, and other property of the state, were "pledged" for the redemption of the bills, and the legislature "pledged" themselves, at the expiration of ten years from the passage of the act, to redeem all the bills to be issued by virtue of the act, in gold and silver. The bank was also required to withdraw from the circulation, annually, one tenth part of the whole amount of the bills issued.

From this statement of the prominent features of the bank law it clearly appears that our bank and the Missouri loan office, although called by different names, were similar in their objects, and both were established for the purpose of emitting a paper currency to circulate as money in the respective states. The issuing of these bills is, according to the decision of the supreme court of the United States, emitting "bills of credit," and a violation of the constitution of the United States. It is also to be remarked, in relation to the act establishing our state bank, that it is obnoxious to the charge of attempting to force the bills of the bank into circulation by staying creditors from collecting their debts for three years, unless they would receive these bills in payment.

It results from this review of the provisions of the bank law, that it contains objectionable features not found in the Missouri loan office law; and there can be no doubt, if this case were presented to the supreme court of the United States, that that court would decide that the bills issued by the State Bank of Illinois were "bills of credit," and that the sealed note on which this action was brought was given for an illegal consideration, and therefore null and void. Such being the opinion of this court,

we are compelled to say that the judgment of the circuit court must be reversed.

As the decision now given conflicts with the decision of this court in the case of *Snyder v. The President and Directors of the State Bank of Illinois*, Breese, 122, it is proper to notice the circumstances under which that decision was made. This court there say, "that the debtors of the bank can not raise the objection that the charter of the bank is a violation of the constitution. After having borrowed the paper of the institution, both public policy and common honesty require that the borrowers should repay it." It is therefore unnecessary to decide whether the incorporation of the bank was a violation of the constitution or not. This decision was made in 1826, and before the decision of the supreme court of the United States, and under circumstances that did not afford this court an opportunity to investigate authorities to any extent. Similar decisions had been made in Missouri and Kentucky, and it was understood in other states. The error, therefore, which this court fell into in that case was, as far as the information of the court extended, a common one. A further apology might be offered for the error, in the consideration that after all the light that time and further investigation had shed upon the subject, one at least, if not more, of the judges of the supreme court of the United States entertained the same opinion.

Judgment reversed.

DECISIONS OF COURTS OF THE UNITED STATES, when should be followed in the state courts: *Bell v. Perkins*, 14 Am. Dec. 745; *Terry v. Bleight*, 16 Id. 101.

BILLS OF CREDIT, WHAT ARE.—What constitutes a bill of credit was considered by the supreme court of the United States in the case of *Craig v. State of Missouri*, 4 Pet. 410. The majority of the court there say: "Bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." "Two of the dissenting judges on that occasion gave a more definite, though perhaps a less accurate meaning of the term bills of credit. By one of them it was said 'a bill of credit may, therefore, be considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill.' And in the opinion of the other, it is said: 'To constitute a bill of credit, within the meaning of the constitution, it must be issued by a state, and its circulation, as money, enforced by statutory provisions. It must contain a promise of payment by the state generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the state; not that it will be paid on presentation, but that the state at some future period, on a time fixed or resting in its own discretion, will provide for the payment.' These definitions cover a large class of bills of credit issued and cir-

culated as money, but there are classes which they do not embrace, and it is believed that no definition, short of a description of each class, would be entirely free from objection, unless it be in the general terms used by the venerable and lamented chief justice. The definition, then, which does include all classes of bills of credit emitted by the colonies or states, is, a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money:" *Briscoe v. Bank of Commonwealth of Kentucky*, 11 Pet. 313. At page 318 of the opinion from which we have just quoted, the court further say: "To constitute a bill of credit within the constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life. The individual or committee who issue the bill must have the power to bind the state; they must act as agents, and, of course, do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a state can not emit."

The term bill of credit was held to include certain loan certificates issued by the state of Missouri, receivable at the state treasury, or any of the loan offices of the state, in discharge of taxes and of debts due the state, and some other public payments, a fund being constituted to redeem such certificates: *Craig v. State of Mo.*, 4 Pet. 410; *Byrne v. State of Mo.*, 8 Id. 40. But in several cases the bills of state banks have been adjudged not to constitute bills of credit: *Briscoe v. Bank of Ky.*, 11 Id. 257; *Nathan v. Louisiana*, 8 How. U. S. 81; *Woodruff v. Trapnall*, 10 Id. 205; *Darrington v. State Bank of Ala.*, 13 Id. 12; *Curran v. State of Arkansas*, 15 Id. 318; *Veazie Bank v. Fenno*, 8 Wall. 552, because they were not paid directly by, nor in the name of the state, nor did they purport to pledge the credit or faith of the state.

AN ACT FORBIDDEN BY LAW is not a sufficient consideration to support a promise: *Ayer v. Hutchins*, 3 Am. Dec. 232; *Nichols v. Ruggles*, Id. 262; *Cusack v. White*, 12 Id. 669; *Gulick v. Ward*, 18 Id. 389 and note; *Seidenbender v. Charles*, 8 Id. 682 and note; *Wilson v. Spencer*, 10 Id. 491; *Hibernia I. C. v. Henderson*, 11 Id. 593; *Gray v. Roberts*, 12 Id. 383 and note; *Milne v. Davidson*, 16 Id. 189; *Plumer v. Smith*, 22 Id. 478.

CARSON v. CLARK.

[1 SCAMMON, 113.]

TO BAR AN ACTION BEFORE A JUSTICE OF THE PEACE on the ground of a prior suit between the same parties, it must be shown that such prior suit was tried, and that the demand now in suit could have been joined in the former action with the demand there sued upon.

COMPETENT PARTIES AND SUFFICIENT CONSIDERATION are essential to a valid contract.

A PROMISE TO PAY FOR IMPROVEMENTS erected on public lands, to which the promisor has acquired title from the government. is without consideration and void.

ACTION by the appellee, Clark, before a justice of the peace; appealed to circuit court, which gave judgment for sixty-nine

dollars and eighty-seven cents in favor of Clark. The opinion states the facts.

J. Semple, for the appellant.

S. T. Logan, for the appellee.

By Court, WILSON, C. J. The bill of exceptions, or rather demurrer to evidence, in this case, presents this state of facts: The plaintiff below made an improvement on the land of the United States, which the defendant afterwards purchased of the government, and after the purchase promised the plaintiff to pay him the value of his improvements. It further appears from the evidence that the plaintiff had, prior to the commencement of this suit, instituted an action before a justice of the peace upon another demand, without having joined this one with it, though it was at the time a subsisting demand. The first suit was never tried, but was compromised by the parties, and dismissed.

Upon this evidence the court below gave judgment in favor of the plaintiff for the value of the improvements.

The first error assigned to reverse this decision, is that the first suit commenced by the plaintiff is a bar to this action. To support this assignment of error it must appear that the first suit was tried, otherwise it will not be a bar to a subsequent action, and it must also be shown that the demands were of such a nature that they might be consolidated into one action. Neither of these points is made out by the evidence; and as the defendant holds the affirmative of the issue as to this ground of defense, it was incumbent upon him to make them out. The suit was dismissed without trial, and there is no evidence as to the extent of the demands in either suit. The court can not supply this defect, and by implication impose upon the party a forfeiture of his claim, or take from him the right of prosecuting it in the ordinary way.

The second assignment of error presents this question: Was the promise of the defendant founded on a sufficient consideration? Or was it not made without any such consideration, and therefore void?

To constitute a valid contract it must be made by parties competent to contract, and be founded on a sufficient consideration. If the consideration for the promise be past and executed, it can then be enforced only upon the ground that the consideration or service was rendered at the request of the party promising. This request must be averred and proved,

or the moral obligation under which the party was placed, and the beneficial nature of the service must be of such a character that it will necessarily be implied: as a promise by a master to pay his servant for past services. Here the inference is strong that the service was rendered at his request.

Or if a debt is due in conscience, a promise to pay will be binding: as where a father promised to pay for the maintenance of a bastard child. So, too, a promise founded upon an antecedent legal obligation will be valid, as a promise to pay a debt barred by the statute of limitations. Here the legal obligation is voidable, but the moral duty remains unimpaired, and constitutes a good consideration. Test the present case by the broad principle to be deduced from the examples cited, and where will be found any legal or moral obligation on the part of the defendant to constitute a sufficient consideration for his promise? The plaintiff entered upon and improved the land of the government. The motive by which he was actuated in doing so, was entirely selfish, and the act itself unauthorized by law. The defendant was at the time a stranger to the transaction; he had no interest in the land, and was no more benefited, nor, for aught that appears, more likely to be benefited by it, than any other person. A request, then, can not be inferred in the absence of all motive, and the request must be made, or the circumstances from which it is to be implied, must exist prior to, or be concurrent with, the act which constitutes the consideration. Whatever benefit might accrue to the plaintiff by reason of the improvements upon the land he acquired by purchase from the government, he did not receive from the defendant, by virtue of his promise, either title or possession. The land, with the improvements thereon, passed to him by the sale from the government. His promise, then, to pay for that for which he had already paid, and to which he had received a perfect title, was without any consideration.

If there is a moral obligation on the part of any one to make compensation to the plaintiff for the value of his improvements, it is on the part of the government, and under this view of the case it is contended that the defendant, as alienee of the land, incurred all the obligation and liability of the government, his alienor. But there is no principle upon which this position can be maintained. It is true, there are some covenants which run with the land; but between such and the promise here set up, there is not one point of analogy. A purchaser from the government has not entailed upon him other or greater incum-

brances or liability than he would be subject to in purchasing from an individual. Suppose, then, that in the present case the improvements had been made at the special instance and request of the alienor. This would have imposed upon him a legal obligation to make an adequate compensation; but surely his alienee would incur no such obligation. If, then, this legal liability would not be imposed by a transfer of the land, it follows conclusively, that a moral duty which is regarded, both in law and ethics, as entirely personal, would not flow from it. If, however, it should be considered that the defendant was under the same obligation as his alienor, would it, when coupled with his subsequent promise, impose upon him a legal obligation?

To determine this question, it is necessary to inquire whether there are any acts on the part of the government from which a request to enter upon and occupy the public land is to be implied; or whether the act itself can be regarded as meritorious. As to the first branch of the inquiry, it is said that the pre-emption laws which have been passed from time to time amount to a license and invitation to enter upon and occupy the land of the government. There would be much force in this reasoning, if these acts granting a prior right of purchase to the occupant were all the legislation relative to the public lands. But they are not. Whatever presumption they may afford in favor of a license by the government is met and rebutted by the fact that there is a general law of congress, which has been in force since the year 1807, forbidding under severe penalties all intrusion upon the public lands. And I understand, that in pursuance of the instructions of the commissioner of the general land office, the law has been enforced in numerous instances. These pre-emption laws, then, can be regarded in no other light than as acts of grace, exempting such as at the time come within their provisions from penalties which they had previously incurred—but not as repealing or abrogating the general prohibition. If, then, there is no license to settle upon the public lands, but on the contrary it is forbidden, can the act of doing so be considered meritorious, or of that beneficial nature which would impose a moral duty on the government? It is not every benefit that may result to one, from the act of another, that will create this duty either in morality or conscience. The nature of the benefit, the manner in which it is conferred, or the motive which induced it, may be repugnant to the feelings and wishes of the person who is benefited thereby. And no principle of

law will sanction the idea that a moral obligation can be imposed upon another against his will. All the circumstances of the transaction must be of such a nature as presuppose a request, otherwise it will not be a good consideration for a promise. The case cited, where one man shot another with the intention of killing him, but so far from succeeding in his design the wound cured him of the dropsy, with which he was at the time afflicted, is an illustration of the principle that a benefit may be conferred without creating a moral or legal obligation to pay for it.

Under every aspect of the case I am of opinion that the promise of the defendant below was not founded on any legal or moral obligation, which is recognized as constituting a sufficient consideration for such a promise.

The judgment of the court below is reversed, with costs.

Lockwood, J., dissented.

The principal case is cited and followed upon the question of want of consideration for promise made by one who has acquired lands from government, to pay for improvements thereon, in *Hutson v. Overturf*, 1 Scam. 170; *Blair v. Worley*, Id. 179; *Roberts v. Garen*, Id. 396; *Townsend v. Briggs*, Id. 472; *Turney v. Saunders*, 4 Scam. 535; *Blackenship v. Cutrill*, 16 Ill. 62. The principal case is in harmony with *Boston v. Dodge*, 12 Am. Dec. 205, upon the question of agreement to pay for improvements; and with *Lucas v. LeCompte*, 42 Ill. 205, in reference to bar of former recovery.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

HUSTON v. WILLIAMS.

[3 BLACKFORD, 170.]

A GENERAL PLEA OF "FRAUD, COVIN, AND FALSE REPRESENTATION" is a sufficient plea in bar to an action on a writing obligatory, to entitle the defendant to show any false, fraudulent, or covinous conduct of the obligee in procuring the execution of the writing, from which it would appear that, in legal effect, the obligor never executed the bond.

A PLEA THAT A BOND IS VOLUNTARY and without either a good or valuable consideration, is sufficient, because in such a case there are no special facts to aver.

IF A DEFENSE IS FOUNDED UPON A TOTAL OR PARTIAL FAILURE of consideration, or upon fraudulent acts or representations affecting the consideration, the special facts must be pleaded.

THE action was brought by Benjamin Williams against Robert and Hamilton Huston. Williams obtained judgment against them, in the Fountain circuit court, whereupon they prosecuted their writ of error to the supreme court.

C. Fletcher, for the plaintiffs.

A. Kinney, for the defendant.

STEVENS, J. The plaintiff declared in an action of debt upon an instrument in writing, which is described in the declaration as a "writing obligatory, signed with their hands and sealed with their seals." The defendants, after craving *oyer*, demurred to the declaration. The court overruled the demurrer, and the defendants, by leave of the court, withdrew it, and pleaded to the merits. The plea of the defendants is a plea of "fraud, covin, and false representation," in these general terms, with-

out stating the special circumstances, and without averring whether the "fraud, covin, and false representation" relate to the execution of the instrument, or to the consideration or inducement which influenced the obligors to become bound. To this plea the plaintiff demurred, and the court sustained the demurrer.

The errors assigned are: 1. The instrument declared on is not a writing obligatory; 2. The court erred in sustaining the demurrer to the plea.

As to the first error, it is only necessary to say that the withdrawal of the demurrer containing the *oyer* withdrew the *oyer* also, and it ceased to be any part of the record; and we are bound now to presume that the description given in the declaration of the instrument in writing is correct.

The other error presents much more difficulty. The question is, whether a plea of "fraud, covin, and false representation," pleaded in these general words, can be a good plea in bar to an action of debt on a writing obligatory; and, if good, to what extent?

At common law, in an action of covenant or debt on a writing obligatory, a plea of "fraud, covin, and false representation," is a good plea in bar if properly pleaded. But it appears that such a defense only relates to "fraud, covin, and false representation" in the execution of the writing obligatory, and not to the consideration or inducement which influenced the obligor to make the bond. Also illegality, or any act or matter connected with the contract or consideration, which strikes at the contract itself, and shows that it never had any legal entity, and which renders the bond wholly void, is a good defense at common law; but such defense can not be given in evidence under a general plea of *non est factum* or of fraud and covin; the special facts must be averred. But where the fraud, covin, and false representations, which are set up as a defense to a bond, are respecting the right, title, amount, soundness, quantity, quality, or value of the consideration which influenced the obligor to make the bond, the defense is equitable and not legal at common law. Neither is the failure in part or in the whole a legal defense at common law; it is only a defense in equity.

Our statute has made such defenses legal in actions on bonds and writings obligatory, except conveyances of real estate, and instruments negotiable by the law merchant. Under the statute, the entire want of consideration, or the failure in

whole or in part of the consideration, may be pleaded to actions on bonds or writings obligatory; but the manner of pleading is not changed: the pleading must be according to the common law. A plea that a bond is voluntary and without either a good or valuable consideration, is sufficient without any averments more special, because in such case there are no special facts to aver. But if the defense is founded upon a failure in the whole or in a part of the consideration, or upon the false, fraudulent, and covinous acts and representations of the obligee, respecting the consideration which influenced the obligor to become bound, the special facts must be averred.

If, however, the defense is bottomed on the false, fraudulent, and covinous conduct of the obligee, in relation to the execution of the instrument, as where it is fraudulently misread, or another instrument fraudulently substituted for the true one, or where the obligee fraudulently induces the obligor to execute the instrument when he is incapable of judging for himself, either by reason of drunkenness, or lunacy, or where the obligee does any other fraudulent act, which shows that the obligor, in truth and in fact, never, in the eye of the law, executed the bond—the facts may be given in evidence under the plea of *non est factum*, or they may be given in evidence under a general plea of “fraud, covin, and false representation:” *Taylor v. King*, 6 Munf. 358 [8 Am. Dec. 746]; *Wyche v. Macklin*, 2 Rand. 426; *Vrooman v. Phelps*, 2 Johns. 177; *Dorlan v. Sammis*, note to *Id.* 179; *Dorr v. Munsell*, 13 *Id.* 430; *Parker v. Parmele*, 20 *Id.* 134 [11 Am. Dec. 253]; *Collins v. Blantern*, 2 Wils. 347; *Dale v. Roosevelt*, 9 Cow. 307; *Stevens v. Judson*, 4 Wend. 471. In this limited sense the plea under consideration is good, and ought to have been sustained; but no evidence can be given under it, except such as relates to the execution of the instrument.

It may perhaps be thought that this opinion conflicts with the opinion of this court in the case of *Pence et al., Adm'rs, v. Smock*, 2 Blackf. 315, and the authorities there cited; but it is presumed that a correct examination of that case, and those authorities, will show that there is not perhaps any confliction. The circumstances of the case of *Pence et al. v. Smock* are these: John Smock, the intestate, in his life-time, made his bond to Peter Smock, and after his death, Peter Smock brought suit on it against Pence and Brenton, his administrators; and they pleaded generally that the bond was obtained of John Smock in his life-time by Peter Smock, by “fraud, covin, and false

representation." This plea was pleaded by administrators, who the law does not presume were in possession of the particulars of the fraud, they not being parties or privies to the transaction, and were therefore authorized to plead generally; for it is a settled principle of pleading that general words are sufficient where it is to be presumed that the party pleading is not acquainted with the minute circumstances of the case: 1 Chit. Pl. 239; *The People v. Dunlap*, 13 Johns. 437. Again, the plea in the case of *Pence et al. v. Smock* does not conflict with the opinion in this case, because there is nothing on the record to show that the "fraud, covin, and false representations" were intended to apply to anything other than the execution of the bond. Indeed, the record proves almost conclusively that they were not intended to apply to anything other than the execution of the bond, because there is another plea showing specially the failure of the consideration.

The authorities relied on by our supreme court in the case of *Pence et al. v. Smock*, are next to be noticed.

The first is Chitty's Pleadings. Chitty in his first volume says that fraud and covin is a defense to a bond at common law. He must certainly allude to fraud and covin in the execution of the bond, because no doctrine is better settled than the doctrine that fraud, falsehood, or deceit respecting the consideration is no legal defense at common law to a bond. It is otherwise with respect to simple contracts. But when applied to a bond it is a defense in equity only, unless it is made a defense at law by statute. Again, he says in the same volume that such fraud and covin may be pleaded generally. This is correct when applied to the execution of the bond, but it can not at common law be applied to the consideration. He refers to *Tresham's case*, 9 Co. 108.

The case called *Tresham's case* is the case of *Brokesby and Vaux, adm'rs of Henry Vaux, Esq., v. Tresham, adm'r of Sir Thomas Tresham*. It was an action upon a bond made by Sir Thomas in his life-time to Henry Vaux, Esq., in his life-time. The defendant pleaded *plene administravit*, and also divers outstanding recognizances against the estate made by Sir Thomas in his life-time, which were outstanding and unpaid. The plaintiffs replied, as to the recognizances, that they were all paid and performed, but that the defendant kept them on foot outstanding against the estate by fraud and covin, for the purpose of cheating the plaintiffs out of the debt due on the bond. This replication was very correctly decided to be good for two

obvious reasons: First, because it is as special as the nature of the case would admit of. It states the whole transaction, that is, that those bonds and recognizances were all paid and performed, but that the defendant refused to lift them and take them in, for the fraudulent purpose of pleading them as outstanding against the bond on which the suit was brought. There was nothing more special in the nature of the case. And it is a well-settled rule in pleading, that fraud, covin, or anything else, may be averred generally when there are no special facts connected with the defense. In that case the special facts were the payment and performance of the recognizances, and these were specially averred. Secondly, it was pleaded by the administrators of a creditor, and the law presumes a creditor always a stranger to the acts of the administrator of the debtor, and therefore he is allowed to plead generally: *The People v. Dunlap*, before cited, and *Wimbish v. Tailbois*, Plowd. 38.

Chitty, in his second volume on pleading, gives the form of a plea of fraud, covin, and false representation, specially setting out the facts, and adds, at the bottom of that form, that a plea of general fraud and covin may be added. Forms are not law, but they ought to be evidence of what the law is. Chitty refers to no authority to sustain his general plea, but his special plea he sustains by the cases cited in his note. The first one is the case of *Cockshott et al. v. Bennett et al.*, 2 T. R. 763. This case has nothing whatever to do with the principle, nor do any of the judges say anything in relation to it. It was an action of assumpsit on a simple contract, and the whole controversy was about the effect of such acts of fraud in courts of law and courts of equity. The second case is the case of *Hayne v. Maltby*, 3 T. R. 440, and is directly in point to support the special plea, but says not a word about a general plea, or that such a plea ever was or ever could be so pleaded.

The next case relied on by our supreme court, is the case of *Wimbish v. Tailbois*, Plowd. 38. This was an action of trespass, done in lands, brought by Wimbish and wife, against Elizabeth Tailbois, widow of George Tailbois, deceased. The defendant, Tailbois, set up title to the lands, and justified. The plaintiffs, among other things, replied that a certain recovery in *formedon in descender*, which one William Tailbois brought, was by covin between the said William, and the said Elizabeth Tailbois, the defendant, without the assent or consent of the plaintiffs, Wimbish and wife. This replication was sustained by a majority of the court, Justice Brown dissenting. The judges

delivered their opinions *seriatim*, and gave specially their reasons for sustaining the replication, which are: 1. Because the law does not require a person to aver that which the law does not presume he knows, and that the covin, in that case, was between the defendant and a third person, in a certain transaction to which the plaintiffs were entire strangers, and therefore not presumed to know the minute particulars. 2. That the replication was pleaded under and by virtue of a statute respecting covinous recoveries of real estate by women, and was authorized in that general form by the statute. But they all explicitly stated that at common law, the special facts must be averred. Justice Brown, in dissenting, said, that although the statute was general, yet the pleading ought to be according to the common law, and, by the common law, the cause of covin must be shown.

The next case cited by our court is the case of *Gordon v. Gordon*, 1 Stark. 294. There is nothing in this case to show whether the plea was general or special, or to show what it related to. There was no opinion on the plea, nor does it appear to have been brought into question. The case went off on other grounds. The reporter simply adds, that there was also a plea of fraud and covin; but whether it was a general or special plea, is not shown.

In the case of *Sherwood v. Johnson*, 1 Wend. 443, a general replication of fraud and covin was sustained. This was a suit by a creditor of the testator in his life-time, against his executor after his death, and the fraud and covin set out in the replication, were charged to be fraud and covin committed by the testator and the executor, in the life-time of the testator, in a transaction to which the creditor was neither a party nor privy, and therefore he was authorized to plead generally, the law not presuming him to be acquainted with the special circumstances. This case is, in principle, precisely like *Tresham's case*, and does not conflict with anything in this opinion.

If this view of the case is correct, and we think it is, the judgment of the circuit court must be reversed, and the cause remanded for further proceedings, in accordance with this opinion.

McKINNEY, J. Dissenting from the opinion just delivered, it would seem proper that I should give the reasons upon which that dissent is founded. In examining the question, I shall advert to the common law, to adjudications in some of our sister states, to some statutory provisions, and to the case

of *Pence et al. v. Smock*, decided by this court at its May term, 1830.

The general proposition is admitted, that fraud is a defense at law; but from this admission it does not of consequence follow that as a defense it is applicable without qualification to all actions, or that when appropriate it is in the election of the pleader to use either a general or a special plea. Pleading is a science, and as such is governed by rules. When exceptions occur in the operation of these rules, they are supposed to be founded on the original inapplicability of the rule to the development of a principle, or upon some innovation or modification of the doctrine to which the rule applies, rendering its enforcement a defeat of the object proposed to be attained. Without dwelling upon the system, with its rules, "founded in strong sense and the soundest and closest logic," peculiar to the various actions, promoting justice, and protecting against the greatest of evils in judicial proceedings, uncertainty and confusion, I will only remark that to an action of debt on a specialty, the general issue is *non est factum*, and that matter legally in avoidance of the action, and unconnected with the execution of the instrument, must be specially pleaded.

To present the question of the admissibility of this general plea of fraud, so as to prevent any misapprehension of my view of it, it is necessary to examine what evidence may be given under the plea of *non est factum*, and what matters in avoidance of a deed should be specially pleaded.

A deed is either void at common law *ab initio*, or it is voidable. When it is the foundation of a suit, the defendant may give in evidence under the plea of *non est factum*, which plea is merely to the execution of the instrument, that it was void *ab initio*, as that it was obtained by fraud, a different instrument being substituted from that which the defendant supposed he was executing; that he was made to sign the instrument when so drunk as not to know what he did; that it was made by a married woman, etc.; or that it became void after it was made, and before the commencement of the suit, by erasure, alteration, addition, etc.: 1 Chit. Pl. 479; *Collins v. Blantern*, 2 Wils. 341, 347; *Lambert v. Atkins*, 2 Camp. 272, 273; *Van Valkenburgh v. Rouk*, 12 Johns. 337; 1 Phil. on Ev. 128; *Pill v. Smith*, 3 Camp. 33; *Dorr v. Munsell*, 13 Johns. 430; 6 Com. Dig. Pl. 2 w. 18. But where the deed is merely voidable on account of infancy or duress, or void by statute, as in the case of gaming, etc., such matters must in general be pleaded: *Id.* In 6 Com.

Dig. Pl. 2 w. 18, treating of *non est factum*, it appears that that plea is good in all cases where the bond or specialty was not executed, or if it was executed, was void *ab initio*, and if void *ab initio* that the facts which make it so may be averred and specially pleaded, but that it is no plea when the deed is only voidable, in which event the matter of avoidance must be specially pleaded. It would thus seem that matter which shows the deed to be voidable, must be specially pleaded, but that matter which shows the deed to be void, may either be given in evidence under the plea of *non est factum*, or be pleaded specially.

A special plea must state the facts constituting the defense on which the defendant means to rely, and consequently in adopting a special plea, embracing matter which could be given in evidence under the plea of *non est factum*, or which shows the deed to be voidable, the party is bound to present those facts in his plea. This is necessary to enable the court to determine if an issue in law be joined, whether the facts so pleaded constitute a legal defense; or if an issue to the country and a verdict, whether a judgment can be rendered. At common law a seal importing a consideration, the want or the failure of consideration was not a defense, because the party would thus contradict his solemn act. A distinction, however, exists between the illegality of the consideration and the want or the failure of the consideration. The former, as we have seen, as it would show the bond to be void, it affecting its execution, could be given in evidence under the plea of *non est factum*, or be specially pleaded; the latter was only an equitable defense. If, then, fraud be the ground of defense to an action on a deed, if it be not given in evidence under the plea of *non est factum*, it must be especially pleaded.

On examination I have been unable to find a single adjudication, other than that of *Pence et al. v. Smock*, in support of a general plea of fraud to an action on a deed, although I have met with two or three cases in which such pleas have been filed, but these cases appear to have been decided without reference to such plea. From the general principles of the law it would seem that such a plea could not be sustained, and from a decision to which I will refer, the reasons why such a plea is not good are, to my satisfaction, irrefutably presented. A general plea such as that before me, with the exception perhaps of the verification, would appear to be warranted by a suggestion of Chitty, at the conclusion of the form he gives of a special plea

of covin and fraud, in vol. 2 on Pl. 512; and in a note to that plea he says, "that fraud is a defense at law." He cites, in support of this position, *Cockshott v. Bennett*, 2 T. R. 765, and *Hayne v. Maltby*, 3 Id. 438. The first was assumpsit, the plea special, and unquestionably from the action the defense proper. The second was covenant, but the case does not sustain a general plea, nor does it establish that fraud is a defense on a specialty. The pleas were special, and the deed not contradicted but avoided by collateral matter, and Lord Kenyon, in answer to the objection of an estoppel, and distinguishing the case before him from one relied on, assumed ground entirely opposite to the support of a plea *per fraudem*, such as is now under examination. These cases, therefore, neither support the plea nor the unqualified dictum of Chitty, "that fraud is a defense at law."

In New York, in a series of adjudications, although fraud is admitted to be a defense in the action of assumpsit, it is denied to be such in an action on a bond: *Dorlan v. Sammis*, 2 Johns. 179, in a note; *Vrooman v. Phelps*, 2 Id. 177; *Beecker v. Vrooman*, 13 Id. 302; *Dorr v. Munsell*, 13 Id. 430; *Parker v. Parmele*, 20 Id. 130 [11 Am. Dec. 253]; *Dale v. Roosevelt*, 9 Cow. 307; *Stevens v. Judson*, 4 Wend. 471.

In *Dorr v. Munsell*, which was debt on a bond, there were three pleas: 1. *Non est factum*; 2. A special plea of fraud; 3. A general plea of fraud. On demurrer to the second plea, C. J. Spencer said: "At law, the defendant can not avoid a solemn deed on the ground of a want of consideration. That inquiry is precluded by the very nature of the consideration. In some elementary writers it is said that fraud may be given in evidence under the plea of *non est factum*. This must be confined to cases where the fraud relates to the execution of the instrument; as if a deed be fraudulently misread, and is executed under that imposition, or where there is a fraudulent substitution of one deed for another, and the party executes a deed he did not intend to execute." The plea was adjudged insufficient.

Dale v. Roosevelt was an action of covenant, and *non est factum* was pleaded, with a stipulation "that the defendant might give in evidence, under the plea, all matters which he might do, as if the same had been specially pleaded, or notice thereof given." The defendant offered to prove that the execution of the bond had been induced by the fraudulent representations of the plaintiff that the lands mentioned in it contained a coal mine, which was untrue. The offer was overruled. It was said "the offer was no more than to prove a partial failure of con-

sideration, and that this was no defense to a sealed instrument. Matter may be shown which strikes at the contract itself, in such a manner as to show it had no legal entity, as usury, simony," etc. The well-settled distinction was also taken in this case between the illegality of the consideration and the want or failure of consideration, and the court said that "any matter which shows the consideration illegal by the common law or statute may be given in evidence under *non est factum*, and that in a court of law, a bond can not be invalidated for any other cause than the illegality of the consideration, as when the bond is void in law or procured by fraud."

The cases of *Chew, Ex'r of Wormeley, v. Moffett*, 6 Munf. 120, and *Taylor v. King*, Id. 358 [8 Am. Dec. 746], are accordant, and show that fraud can not be pleaded to an action at law on a bond, and limit its proof on the plea of *non est factum*, to the mere execution of the deed; and in a late case, *Tomlinson's Adm'r v. Mason*, 6 Rand. 169, in an action on a bond, that court has said, in relation to a general plea of fraud, covin, and misrepresentation: "The third (alluding to that plea) does not state whether the fraud and misrepresentation affected the consideration of the bond, or the manner of its execution, and therefore presents no point on which an issue could be taken or judgment rendered."

We have a statute which authorizes a defendant to allege, by "special plea," the want or failure of the consideration of a specialty. This is unquestionably an important change and a great improvement of the common law; but it surely does not amount to a radical change of all the rules of pleading governing actions on specialties, nor can the statute authorizing a "special plea" of the want or failure of the consideration of a specialty be construed to alter the rules of evidence, applicable to the plea of *non est factum* and other pleas, or legitimate a general plea of fraud, which leaves at large the application of testimony under it. The statute permits a defense at law, which was previously confined to a court of chancery; and when it authorizes a defendant, by "special plea," to allege the want or the failure of the consideration, it could not contemplate that a general plea *per fraudem*, without setting out the facts relied on, and applying them either to the want or to the failure of the consideration, would be sufficient. The word "special" applied to a plea, has a known, legal, and technical import, to which I have adverted, and of which it is inadmissible to presume the

legislature to have been ignorant. The statute provides two separate and distinct grounds of relief at law by special plea, neither of which was available at common law. In the language of the court in the case of *Tomlinson's Adm'rs v. Mason*, may I not say, "that this plea does not state whether the fraud and misrepresentation affected the consideration of the bond or the manner of its execution, and therefore presents no point on which an issue could be taken or judgment rendered"? Exclusive, however, of this decision, directly in point, and of our statutory provision, I regard the plea as insufficient, and opposed to the principles to which, sustained by authorities, I have adverted.

Before I direct my attention to the case of *Pence et al. v. Smock*, I will remark that the want or the failure of the consideration of a specialty may arise from circumstances unconnected with fraud on the part of the obligee, or may arise from his fraudulent act. The statute does not seem to contemplate fraud as essential to either defense; but when either is used, it must be by "special plea;" consequently, the plea in this case being general, can not apply. Its application to the execution of the specialty is equally as inadmissible, since, from the positions assumed, matter of that character, if not admissible under the plea of *non est factum*, must be specially pleaded.

From this examination, in which the common law and its exposition by enlightened courts, and our particular statutory provisions, are presented, I am brought to the conclusion that the circuit court was correct in its judgment. Here I would willingly stop; but as my opinion is in conflict with the case of *Pence et al. v. Smock*, which has been reviewed in the opinion just delivered, and recognized as law, it would seem proper that I should also examine the principles of that case.

In that case, at its May term, 1830, this court held a plea, such as the present, good, and say: "The objection is, that the particulars of fraud are not set out. This general mode of pleading fraud we conceive to be correct. It is supported by good authority." *Wimbish v. Tailbois*, 1 Plowd. 38, 54; *Tresham's case*, 9 Co. 108; 3 Chit. Pl. 563; *Mason v. Evans*, Cox, 182; *Gordon v. Gordon*, 1 Stark. 294, are cited. These cases do not establish to my satisfaction the sufficiency of the plea. They are decisive of the law as far as they go. They relate, however, to replications and to pleas presenting matter collateral to actions, and not to such as constitute their foundation. The case of *Tailbois* was trespass *quare clausum fregit*; plea, *liberum*

tenementum, and replication thereto, covin in the recovery of the land set out in the plea. The replication was founded on the statute 11 Hen. VII., c. 26, by which it is enacted: "That upon recovery by covin, it shall be lawful for the person to enter into the same tenements," etc. Replication adjudged good, although it showed covin generally. Hales, J., said: "That when statutes speak of covin generally, it shall be shown generally, but otherwise of covin at common law." *Tresham's case* was debt on bond against an administratrix. Plea, debts by recognizances acknowledged, etc., and unpaid. Replication *per fraudem* and adjudged good. The reference to 3 Chit. Pl. 563, shows a form of a replication *per fraudem* to a plea of release. *Gordon v. Gordon* was covenant, and the case went off without adjudication upon a plea of fraud. Chitty on Pl., vol. 1, p. 553, treating of replications, says that "it is in general unnecessary to state the particulars of fraud." He cites *Tresham's case* and other cases, which relate, however, to replications *per fraudem*. In *Sherwood v. Johnson*, 1 Wend. 443, the court overruled a demurrer to a replication *per fraudem* to a plea of judgments outstanding, and Savage, C. J., delivering the opinion of the court, sustains the text of Chitty above cited, and says: "It is sufficient to allege fraud generally." This approval was, however, confined to the particular point before the court.

From this general view of the question, I am compelled to dissent from the opinion just delivered. In doing so, I feel less reluctance than I otherwise should, from the reflection that if there be error in the view I have taken, the error is harmless in its operation upon the interests of litigants in this court.

By COURT. The judgment is reversed, with costs, cause remanded, etc.

PLEADING FRAUD.—The doctrine of the principal case, that a general plea that a deed or other instrument was obtained by fraud and misrepresentation, is sufficient, is quite well sustained by the authorities: Chit. Pl. 563, note i, citing *Tresham's case*, 9 Co. 110; *Hill v. Montague*, 2 Man. & Sel. 378; *Webb v. Steele*, 13 N. H. 230; *Weld v. Locke*, 18 Id. 141; *Hort v. Holcombe*, 23 Id. 535; *Wimbish v. Tailbois*, Plowd. Com. 38; *Knight v. Peachy*, T. Raym. 303; Vent. 329; *Daniels v. Coombe*, 2 Scott, N. R. 597; *Sherwood v. Johnson*, 1 Wend. 443; *Pierce v. Smock*, 2 Blackf. 316; *Mason v. Evans*, Coxe, 182; *Pemberton v. Staples*, 6 Miss. 50; *Stoever v. Wier*, 10 Serg. & R. 25. We apprehend that these decisions must be maintained, if at all, upon the ground that the fraud related to the execution of the instrument, and that, owing to the fraud and misrepresentation, the party never gave his assent to the instrument or the contract as it in fact was; in other words, that it is not his deed or obligation. In many cases, evidence of fraud might be given under the

general issue in *assumpsit*, or under the plea of *non est factum* when the action was upon a sealed instrument: *Whelpdale's case*, 5 Co. 119; *Vine v. Mitchell*, 1 Man. & R. 337; *Van Valkenberg v. Rouk*, 12 Johns. 337; *Ragsdale v. Thorn*, 1 McMull. 335.

It is very difficult to reconcile the foregoing authorities with others declaring in general terms that the facts constituting fraud must be specifically alleged. Thus in New Hampshire, where the general plea of fraud and covin has been more frequently sustained than in any other state, it is well settled that one who wishes to assail a discharge in bankruptcy as fraudulent, must point out the respect in which it is fraudulent or in which the conduct of the bankrupt will preclude him from having the full benefit of the discharge: *Bell v. Lamprey*, 52 N. H. 46. In Indiana, without questioning the principal case, it has been said that "the general allegation of fraud is not of itself sufficient; that the facts, the acts and circumstances which constitute the fraud, must be alleged:" *Darnell v. Rowland*, 30 Ind. 346. The other decisions containing like declarations are numerous and weighty: *Beaubien v. Beaubien*, 23 How. U. S. 190; *Moore v. Greene*, 10 Id. 69; *Kent v. Snyder*, 30 Cal. 666; *Bryan v. Spruill*, 4 Jones' Eq. 27; *Semple v. Hagar*, 27 Cal. 166; *Abraham v. Gray*, 14 Ark. 302; *Slack v. McLagan*, 15 Ill. 242; *Hopkins v. Woodward*, 75 Id. 62.

If the principal case and others in consonance with it can be maintained in harmony with other cases of unquestioned authority, it must be because "the fraud is confined to a single fact, the signing of a single deed or release which is pleaded and specified:" *Bell v. Lamprey*, 52 N. H. 47. In other cases, the facts constituting the fraud or covin, and relied upon as grounds for relief, must be distinctly and specifically alleged. Further cases in this series upon this point are *Davis v. Hooper*, 24 Am. Dec. 751, and *Taylor v. King*, 8 Id. 746, and note.

CHRISTIANBERRY v. CHRISTIANBERRY.

[3 BLACKFORD, 202.]

ONE SHOWN TO BE GUILTY OF ADULTERY is not entitled to obtain a divorce from his wife for a like offense previously committed by her.

A PETITION FOR DIVORCE ON THE GROUND OF ADULTERY ought to state the time and place of its commission.

ERROR to the Rush circuit court.

M. M. Ray, for the plaintiff.

H. Gregg, for the defendant.

MCKINNEY, J. This is a petition filed by the plaintiff in error, in the Rush circuit court, to obtain a divorce on a charge of adultery and voluntary abandonment. The petition states that the parties have been married twenty-seven years, and charges that the defendant was guilty of adultery, and had eight years ago left the plaintiff voluntarily, with the intention of abandonment, and has continued separate since. It is further alleged, that the petitioner has resided in this state four

years. The circuit court dismissed the petition, and rendered judgment in favor of the defendant for costs.

The testimony on which the judgment was founded, is presented by the record. It appears that the parties resided in the state of Tennessee, and that eight years since the defendant left the plaintiff, who had endeavored in vain to induce her to return to him; that it was generally understood that the defendant lived in adultery; that since the plaintiff came to this state, he has lived with a woman who has children, supposed to be his; and that nothing was alleged against him until the departure and adultery of his wife.

The statute regulating divorces, designates particular causes for which they may be granted; among these is adultery, or where either party has left the other with the intention of abandonment, for the space of two years; and further gives authority to the circuit court to grant them, when, in its discretion, it may be considered reasonable and proper. We can not admit, as was contended, that proof of voluntary abandonment, of adultery, or of any of the other causes designated, would, unconnected with acts of the opposite party, render it imperative on the circuit courts to grant a divorce. Such a construction of the act would not only conflict with the legislative intendment, and oppose settled principles of law, but would afford an inducement to all disposed for a change of the relation, to enforce the extension of its benefit by a course of conduct, from which the result intended must necessarily flow. Legislation contemplates the prevention of wrong; but never invites to its commission. The wronged and injured are the objects of its protection; its sanctions await offenders. If the construction contended for were admitted or warranted, cruel treatment or corrupting example, bringing a party within the act, would enable him to take advantage of a wrong. This would be in opposition to the settled law. We think, that so far from proof alone, of the causes specified, entitling the plaintiff to a divorce, he should not only at the time the offense charged was committed, but at the time of the application for relief, have presented himself, if not unoffending, at least unobnoxious to the penal laws of the state. Suppose the abandonment charged was caused by the conduct of the plaintiff, surely proof of the fact would defeat the application for relief. In the case of *Williamson v. Williamson*, 1 Johns. Ch. 488, the law is regarded to be settled, that in adultery, the reception by the injured party of the offender, lapse of time; or long acqui-

escence without any disability to sue, is a bar to a prosecution for a divorce. Although the testimony before us is extremely vague, it may yet be inferred, if any part is properly applicable to the charge of adultery, that the commission of that offense by the defendant was known to the plaintiff, when he endeavored to induce her to return to him. Such an effort made, with a knowledge of the fact, was a waiver of any right to relief.

The petition charges the defendant with the crime of adultery. The charge is as vague and indefinite as it could be presented. In *Codd v. Codd*, 2 Johns. Ch. 224, it is said "that adultery should be specifically charged as to time, place, or person, so as to enable the defendant to meet the accusation." In this case the parties were married twenty-seven years ago, and in so serious a charge the responsibility of sustaining her character during so long a period is thrown upon her, if so general a charge could be regarded as sufficient. Some modification of the rule laid down in *Codd v. Codd*, is however presented in *Germond v. Germond*, 6 Johns. Ch. 347 [10 Am. Dec. 335], in which the chancellor, after reviewing the cases upon the point, comes to the conclusion "that the better opinion is that a charge of adultery need not specify the names of the persons with whom it was committed, and certainly it can not and need not be required if the persons are unknown when the bill is filed." Yet it would seem that time and place should be specifically charged. A general charge must produce surprise and inability on the part of the most vigilant to make the necessary preparation for defense. The testimony on this point is as broad as the charge. One witness states that it was generally understood in the neighborhood that the defendant lived in adultery. Another says he heard nothing against the plaintiff before the departure and adultery of the defendant. The record shows the defendant to be a non-resident, and the witnesses are on the part of the plaintiff; yet to what does this testimony amount? Clearly not to legal proof of the defendant's guilt.

From these witnesses it also appears that the plaintiff, since he has lived in the state, has lived with a woman who has had children they suppose to be his. He, then, thus living in adultery, is neither unoffending nor irresponsible to the violated laws of the state, and can not be the subject of the relief asked.

We are therefore of opinion that the circuit court was cor-

rect in dismissing the petition, and rendering judgment in favor of the defendant for costs.

By COURT. The judgment is affirmed, with costs.

DENIAL OF DIVORCE, because of the wrongful acts of complainant, see *Pierce v. Pierce*, 15 Am. Dec. 210, and note.

ALLEGATION OF ADULTERY.—The charge that the defendant “committed adultery at divers times since her marriage, with W. O. F. and others to plaintiff unknown,” was held, in *Germond v. Germond*, 10 Am. Dec. 335, to be sufficient. If the name of the person with whom the act is committed is known, it must be stated; and the time and place of its commission should be stated with reasonable certainty, to enable the defendant to meet the charge on the trial, and to refute it if untrue: *Conant v. Conant*, 10 Cal. 249; *Heyde v. Heyde*, 4 Sandf. 692; *Fox v. Smith*, 34 Miss. 597; *Mitchell v. Mitchell*, 61 N. Y. 396.

FULLERTON v. WARRICK.

[3 BLACKFORD, 219.]

IN AN ACTION FOR ASSAULT AND BATTERY, the defendant, to mitigate damages, can not be permitted to prove, that on divers occasions previous to the assault, the plaintiff has slandered and abused him.

TO MITIGATE DAMAGES BY PROOF OF PROVOCATION by the injured party, it must appear that the act of the offender was committed during the continuance of the passion excited by the provocation, and before his blood had time to cool.

ERROR to the Gibson circuit court.

R. Crawford, for the plaintiff.

S. Hall, for the defendant.

STEVENS, J. Fullerton brought an action of trespass, assault and battery against Warrick, in the Gibson circuit court. An issue on the plea of not guilty was joined between the parties, a jury trial had, and a verdict rendered for the plaintiff.

It appears of record by a bill of exceptions, that the defendant, on the trial before the jury, was permitted by the court to prove, in mitigation of damages, that the plaintiff had been for several years past and up to the time of the commission of the assault and battery, in the constant habit of abusing and slandering the defendant; that about one year and a half before the trial, which was about one year before the time of committing the trespass complained of, the plaintiff said that the defendant was an unprincipled man and a liar; and that at an election for trustees of the town of Princeton, held several years before the time of committing the assault and battery, the plaintiff voted a ticket for trustees in which he connected the

name of the defendant with the name of a man of color. To the introduction of this evidence the plaintiff objected, but the objection was overruled and the evidence went to the jury. There is no proof appearing of record that there was any insult, abuse, or offensive language given or used by the plaintiff at the time the trespass was committed. The expression used in the bill of exceptions does not sufficiently convey any such an idea.

The only question before the court is whether the evidence set out in the record was correctly permitted to go to the jury, in mitigation of damages?

The law, in tenderness to human frailties, distinguishes between an act done deliberately and an act proceeding from a sudden heat. As if upon a sudden quarrel two persons fight and the one kills the other, this has been adjudged only manslaughter. So if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though this is not excusable, the offense is mitigated homicide. But in every case of homicide upon provocation, if there be any time intervening between the insult and the killing, sufficient for passion to subside and reason to interpose, the offense becomes murder. In analogy to this principle, evidence in civil actions for assault and battery is admitted, in mitigation of damages, to show a provocation on the part of the person complaining of the injury. But the provocation must be so recent as to induce a fair presumption that the violence done was committed during the continuance of the feelings and passions excited by it, before the blood has had time to cool; a different rule would greatly encourage breaches of the peace, rencounters, and brutal force. For the purpose of illustration we will notice two or three leading cases.

First the case of *Avery v. Ray*, 1 Mass. 12. This was an action of trespass, assault and battery, tried on the plea of not guilty. The defendant offered to prove in mitigation of damages that the plaintiff reported that the sister of Ray, one of the defendants, had openly solicited the plaintiff to have carnal connection with her; that Ray having heard that, called on him to know whether he had or had not said so, and that he refused to confess or deny it; that the defendant then told him that he would chastise him for it, and did so do; and for that chastisement the action was brought. The court said that the admission of such evidence is contrary to all rule; that immediate provocations are admitted in mitigation of damages, but when time for reflection has intervened, so as to give the blood time to cool, they are not admitted.

Secondly, the case of *Lee v. Woolsey*, 19 Johns. 319 [10 Am. Dec. 230]. This was an action of trespass, assault and battery, also tried on the plea of not guilty, in the month of July, 1820. The defendant was a post captain in the navy, and the plaintiff was an attorney at law. On the trial the defendant offered to prove in mitigation of damages that in the month of February preceding, the plaintiff had addressed to the secretary of the navy a scandalous and defamatory letter respecting the defendant, charging him with having embezzled the public property under his care as a post captain; and that that letter had been circulated among the citizens of the place where the parties resided, and had been known to the defendant only a few hours before the time of committing the violence complained of, and that at the time of committing the violence, and before the commencement of the attack, the defendant asked the plaintiff whether he was the author of that scandalous and defamatory communication or not, and he admitted that he was, but stated that he wrote it as an attorney, and was paid for it. The defendant also offered to prove that on the day before the attack was made by him on the plaintiff, the plaintiff had made scandalous insinuations against him respecting his having embezzled the public property. The court said that the evidence was not admissible in mitigation of damages, there having been time between the provocations and the assault for deliberate reflection.

We will notice one other case only, and that is the case of *Rochester v. Anderson*, 1 Bibb, 428. In that case the defendant offered to prove in mitigation of damages, that the plaintiff had circulated slanderous reports about him, and for that he had assaulted him. The court refused the evidence on account of the time which intervened between the time of giving the insult and the time of making the assault. The court in that case says, that such opprobrious language, if used at the time of the battery, and especially if used with an intent of provoking a quarrel, would be legal evidence in mitigation of damages; but if there have been time for deliberation, the peace of society requires that men should suppress their passions.

There is nothing upon the record before us which authorizes us to presume that the evidence in question was correctly permitted to go to the jury.

By Court. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

ADAMS v. LISHER.

[3 BLACKFORD, 241.]

A VARIANCE IN MERE MATTER OF FORM between the record of acquittal offered and that pleaded, is not sufficient to warrant its exclusion as evidence, especially when the prosecution out of which the acquittal arose was for a misdemeanor only.

A TRANSCRIPT FROM A DISTRICT COURT OF THE UNITED STATES is sufficiently authenticated when it is under the seal of the court and is certified by the clerk to be a "full, true, and complete copy of the record."

IN AN ACTION FOR MALICIOUS PROSECUTION the plaintiff can not recover if he was in fact guilty of the crime for which he was prosecuted, although the defendant did not know of such guilt when he instituted the prosecution.

GOOD CAUSE FOR A PROSECUTION exempts the prosecutor from liability, though his motives were malicious.

ERROR to the Shelby circuit court.

W. W. Wick, for the plaintiff.

O. Fletcher, for the defendant.

STEVENS, J. Lisher declared against Adams for a malicious prosecution. The declaration contains two counts. The first count in substance charges that Adams falsely, maliciously, and without any probable or reasonable cause, prosecuted Lisher in the district court of the United States for the district of Indiana, in an action of trespass for cutting timber on the land of the United States, and caused a writ of *capias ad respondendum* to issue thereon out of said court against him, and caused him to be taken into custody and imprisoned by the marshal of the district, and kept and detained in custody and prison by the marshal for the space of one day; that at the end of that time he was duly discharged out of custody and prison and fully acquitted, etc. The second count is in substance like the first, only it is averred that the defendant was compelled to appear before the district court and answer to the action, and that the court after hearing adjudged and determined that he was not guilty of trespass, and discharged and acquitted him, etc. An issue was joined, on the plea of not guilty, which was tried by a jury, and a verdict and judgment rendered for the plaintiff.

It appears of record, by a bill of exceptions, that the plaintiff offered in evidence to the jury, to support his declaration, a certain transcript of a record of said district court, under the seal of said court, and certified by the clerk thereof, in these words: "I, Henry Hurst, clerk of the court aforesaid, do here-

by certify that the foregoing is a full, true, and complete copy of the record in the above entitled cause, as the same remains of record," to the introduction of which the defendant objected, but the objection was overruled and the transcript was received as evidence. It also appears of record by another bill of exceptions that the plaintiff asked the court to charge the jury, that, although the plaintiff was guilty of cutting certain poplar trees, on the land in the declaration mentioned, yet if that fact was unknown to the defendant at the time he caused the action of trespass to be commenced, the prosecution was malicious, and the prosecutor was liable to the plaintiff in this action for a malicious prosecution. To this instruction the defendant objected, but the objection was overruled, and the instruction given as asked.

The counsel for the plaintiff in error has raised several questions for the consideration of this court.

The first question is, whether the declaration contains a sufficient cause of action? The declaration is not very aptly or technically drawn, but we think it is substantially good. If, however, it is not strictly good, the objection comes too late; it contains a sufficiency to sustain the proceedings, after a trial by jury on the merits.

The next question is, did the court err in permitting the transcript of the record of the United States district court to go to the jury in evidence? The transcript is, by the bill of exceptions, spread upon the record, and is correctly before us.

The first objection raised to show its inadmissibility as evidence, is, that there are variances between it and the record described in the declaration, which ought to exclude it. This objection as to the matter of fact is true; it evidently appears that there are variances between some of the allegations in the declaration and the transcript; but it does not follow of course that it should have been for that excluded. In actions of this sort, the proceedings in the prosecution of the suit should be stated correctly; and the charge against the plaintiff, and the judicial proceedings thereon, should also be stated as they exist, so as to correspond with the facts and with the record of acquittal; and if the prosecution is for a felony, the allegations can only be proved by the record; but if it is a civil suit, or a prosecution for a mere misdemeanor, the strictness in the pleadings is much relaxed, and the allegations may generally be proven by other evidence, unless the declaration is special, referring to the proceedings as they remain of record: 1 W. Bl.

385; 1 T. R. 493; 2 Saund. Pl. & Ev. 199. The prosecution or suit on which this action is bottomed, stands on the foot of a mere misdemeanor; the allegations in the declaration are general, setting out the substance only of the proceedings, and do not refer to the proceedings as they remain of record; and as the points of variation are not matters of material substance, the transcript as to that objection was correctly admitted: 2 Chit. Pl. 300, note d; 5 Price, 540; 2 Saund. Pl. & Ev. 188.

The next objection to the transcript is, that it is not sufficiently authenticated. A record of a district court of the United States is not within the statute of the United States, prescribing the mode in which the records and judicial proceedings of the state courts shall be authenticated. This state has no statute which we think meets the case, and therefore we must decide upon the sufficiency of the evidence upon some reasonable and fixed rule. The mode in which this transcript is certified is the ordinary mode of certifying domestic records in use in the several states, instead of the technical exemplification. We are of opinion that the authentication is sufficient, and that the evidence was correctly received. Such is the rule in the state of New York: *Pepoon v. Jenkins*, 2 Johns. Cas. 119.

The last error complained of, is the instruction of the court to the jury, that although the plaintiff was guilty of cutting some poplar trees on the land in question, as charged in the declaration, yet if that fact was unknown to the defendant at the time he caused the action of trespass to be commenced, the prosecution was malicious, and the defendant was liable to the plaintiff for a malicious prosecution. The grounds of this action are malice, either express or implied, and the want of probable cause; both must exist, or the action can not be maintained. From the want of probable cause, malice may be implied; but the want of probable cause can never be implied from the proof of malice. The direct proof of the most intense malice is not sufficient; there must be proof also of the want of probable cause, or the suit must fail. The want of probable cause is never implied. There is a distinction between malicious arrests in civil suits, between individuals prosecuted for the private benefit of the plaintiff, and a malicious prosecution of an offense, misdemeanor, or wrong, which affects the public. In the latter case, the prosecutor is much more favored than in the other. It is a rule of law, which seems to be founded on principles of policy, convenience, justice, and necessity, that the prosecutor of a wrong that affects the public shall be pro-

tected, provided he has probable cause, however malicious his private motives may have been; for although he may have intended ill, still good may arise to the public: 1 T. R. 493; *White v. Dingley*, 4 Mass. 433; *Lindsay v. Larned*, 17 Id. 190; *Vanduzor v. Linderman*, 10 Johns. 106; 2 Stark. Ev. 911; 2 Wils. 302; 2 Saund. Pl. & Ev. 195; 1 Sw. Dig. 491.

This suit is founded on a prosecution set on foot by the defendant against the plaintiff, for a wrong that affects the public, and therefore the defendant stands on the footing of the most favored class of prosecutors. It was an action of trespass for cutting and carrying away from lands belonging to the public, timber, that is to say, two poplar trees, and one hickory tree, etc. The gist of that action was the trespass, and proof of cutting and carrying away any one of those trees would be sufficient to sustain the action; and if he were guilty of the trespass, he can not maintain this action, although he may have been acquitted in the district court, where he was prosecuted; and it is immaterial whether the defendant knew him to be guilty or not, if he can now prove the fact that he was guilty, or if he can even prove that there was probable cause to suspect him of being guilty, it is sufficient for him.

By COURT. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

MALICIOUS PROSECUTION, action for can not be sustained unless there were both malice and want of probable cause: *Turner v. Walker*, 22 Am. Dec. 329; *Kelton v. Bevis*, 5 Id. 670; *Bell v. Graham*, 9 Id. 687. If the plaintiff was in fact guilty he can not recover, though the prosecution by the defendant was malicious: *Ulmer v. Leland*, 10 Id. 48; *Plummer v. Gheen*, 14 Id. 572.

DUGAN v. VATTIER.

[3 BLACKFORD, 245.]

A BONA FIDE PURCHASER FROM A FRAUDULENT GRANTOR obtains a title which can not be affected by the fraud.

PAYMENT IN FULL, BEFORE RECEIVING NOTICE OF AN EQUITY, is essential to constitute a *bona fide* purchaser.

THE JOINDER OF SEVERAL CREDITORS OF A DECEDENT in a creditor's bill to vacate a fraudulent conveyance is proper.

ERROR to the Dearborn circuit court.

J. Sullivan, for the plaintiffs.

G. H. Dunn and D. J. Caswell, for the defendants.

BLACKFORD, J. William Burke and Charles Vattier filed a bill in chancery against Thomas Dugan, Elias Conwell, and others, in the Dearborn circuit court.

The bill charges that James Conn in his life-time was indebted to each of the complainants; that since Conn's death the complainants have obtained judgments against his administrator for their respective claims; and that there is no personal property to satisfy the judgments. It is also charged that, pursuant to a corrupt agreement between Conn and Dugan, a conveyance of all Conn's real estate was executed by him to Dugan, without consideration, for the purpose of defrauding the complainants and others, the creditors of Conn. It is further charged that Conwell fraudulently purchased a part of the land from Dugan, with notice of the fraud in Dugan's title. The object of the bill is to obtain a decree subjecting the land in question to the debts of Conn.

All the material charges in the bill are denied in the answers of Dugan and Conwell.

The following are believed to be the facts: In 1820 Conn, being indebted to various persons in a much greater amount than his property was worth, conveyed all his real estate to Dugan without any consideration for the express purpose of fraudulently securing it, for his own use, from the demands of his creditors. At the date of this conveyance Conn owed the debt, now demanded by Burke, to the person from whom Burke obtained the right to it. After that time Conn became indebted to Vattier. In 1825 Dugan sold and conveyed a part of the land to Conwell for three hundred dollars. Conwell, after having paid two hundred dollars of the purchase money, received notice of the fraudulent title under which Dugan claimed. The residue of the purchase money still remains unpaid. Since these transactions, Conn being dead, judgments have been obtained by Vattier and by the person under whom Burke claims for their respective debts against Conn's administrator.

Upon these facts the circuit court decreed in favor of the complainants against Dugan and Conwell.

There can be no doubt respecting the correctness of the decree in this case, except as it regards the title of Conwell. It is contended by him that as his deed was executed, and two thirds of the purchase money paid before notice of the fraud, his title can not be impeached. This is a case in which a debtor makes a deed to defraud his creditors, and the fraudulent grantee sells the land to a third person. We have a stat-

ute which expressly declares the original deed in such a case to be absolutely null and void, and it is a question which has excited great interest, whether such a fraudulent grantee as Dugan is, can, consistently with the provisions of a statute like ours, convey to any person, under any circumstances, a valid title to the premises. That he can not do so is decided by the supreme court of Connecticut, in *Preston v. Crofut*, 1 Day, 527, note; and by the court of chancery in New York, in *Roberts v. Anderson*, 3 Johns. Ch. 371. But a decision directly to the contrary has since been made by the court of errors in New York, in *Anderson v. Roberts*, 18 Johns. 515 [9 Am. Dec. 235]; and by the circuit court of the United States in the first circuit, in *Bean v. Smith*, 2 Mason, 252.

If we concurred in opinion with the supreme court of Connecticut and the court of chancery of New York, that opinion would put an end at once to the question of notice in the case before us. We should then consider that Conwell could have no claim to the premises under his deed from Dugan, even if all the purchase money had been paid by Conwell previously to his notice of the fraud. The contrary opinion, however, as expressed in the cases of *Anderson v. Roberts* and *Bean v. Smith*, to which we have referred, appears to us to be the most reasonable, and to comport best with the spirit of the common law and of the statute. It becomes necessary for us therefore to determine what effect the notice, received by Conwell whilst one third of the purchase money was unpaid, has upon the validity of his title. The most that he can ask under a statute which declares his grantor's title absolutely void, is to be placed upon the same footing with the purchasers of real estate for which some other person, at the time of the purchase, has an equitable title.

The question as to the effect of a notice of a prior equity is not a new one in this court. It was discussed here several years ago, and an opinion then expressed that unless the deed be executed, and the purchase money paid before notice, the prior equity must prevail: *Gallion v. McCaslin*,¹ November term, 1820. So also it was held by this court, at the last term, that a party can not be considered as an innocent purchaser if after the purchase, but before payment of the purchase money, he receives notice of the prior equity: *Hunter v. Holcroft*. The same doctrine is laid down by Mr. Sugden. His language is as follows: "Notice before actual payment of all the money, although it be secured and the conveyance actually executed, or

before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract:" Sugd. on Vend., Phila. ed. of 1820, p. 530.

That the deed must be executed before the receipt of the notice is decided in *Wigg v. Wigg*, 1 Atk. 382; and that the purchase money must be paid before the notice, is decided in *Harrison v. Southcote*, 1 Id. 528; in *Story v. Lord Windsor*, 2 Id. 630, and in *Tourville v. Naish*, 3 P. Wms. 307. We have been referred by the counsel of Conwell, for a contrary opinion, to the case of *Youst v. Martin*, 3 Serg. & R. 430. The previous decisions, however, which we have cited, must govern the case before us. It is our opinion that the transaction between the fraudulent grantee and the purchaser from him must be completely closed by the payment of all the purchase money, and by the execution of the deed before the notice, or the purchaser can not hold the property from the original grantor's creditors, whom the original grantor and grantee have attempted to defraud.

It is objected by the plaintiffs in error that the complainants, having distinct demands, should have brought separate suits. That objection is answered by the case of *Brinkerhoff v. Brown*, 6 Johns. Ch. 139.

STEVENS, J., having been of counsel in the cause, was absent.

By COURT. The decree is affirmed with costs.

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BONA FIDE PURCHASER without notice of a fraud is protected, though his grantor had notice of or was a party to the fraud: *Rosley v. Bigelow*, 23 Am. Dec. 507; *Durell v. Haley*, 19 Id. 444; *Thomas v. Mead*, Id. 187; *Miles v. Oden*, Id. 177; *Coleman v. Cocke*, 18 Id. 757; *Garlund v. Rives*, 15 Id. 756; *Somes v. Brewer*, 13 Id. 406; *Anderson v. Roberts*, 9 Id. 235; *Hendicks v. Mount*, 8 Id. 623; *Pearlee v. Barney*, 6 Id. 743; *Osborne v. Moss*, 5 Id. 252; *Sands v. Codwise*, 4 Id. 205; *Lee v. Abbec*, 1 Id. 78.

PAYMENT IN FULL before notice, is requisite to constitute a *bona fide* purchaser: *Jewett v. Palmer*, 11 Am. Dec. 401; *Blight v. Banks*, 17 Id. 136; *Jackson v. McChesney*, Id. 521; *Donaldson v. Bank of Cape Fear*, 18 Id. 577; *Nantz v. McPherson*, Id. 216.

JOINDER OF CREDITORS in action to vacate a fraudulent conveyance, see *Edmeston v. Lyde*, 19 Am. Dec. 454; *Birely v. Staley*, *post*.

TOWSEY v. SHOOK.

[3 BLACKFORD, 267.]

PROOF OF AN AFFIRMATIVE must be made by him who alleges it, unless the presumption of law is in favor of the affirmative, as when the issue involves a charge of culpable omission, in which case the party making the charge must prove it, although it involves a negative.

THE ONUS PROBANDI OF ESTABLISHING FRAUD OR FAILURE OF CONSIDERATION as a defense to a note, rests on the defendant.

FRAUD IN THE SALE OF AN ALLEGED PATENT RIGHT must be proved by the party relying upon it.

ERROR to the Dearborn circuit court.

G. H. Dunn, for the plaintiff.

D. J. Caswell, for the defendant.

McKINNEY, J. Debt on a promissory note before a justice of the peace. The defendant pleaded: 1. *Nil debet*; 2. Failure of consideration through the fraud of the payee; 3. That the note was given to Gould, the payee, in part consideration of a supposed patent right, Gould knowing he was not the patentee or assignee, and was without authority to sell the same, but falsely represented himself to be the assignee, and thereby induced the defendant to purchase. Judgment was rendered by the justice of the peace in favor of the plaintiff for debt, interest, and costs.

On appeal to the circuit court, the cause was submitted to the court, and judgment rendered for the defendant.

A motion for a new trial was overruled, and a bill of exceptions shows that on the trial the plaintiff introduced the note in evidence, which was read, and that the defendant called upon the plaintiff to answer under oath, which he did, and stated "that he believed the note was given in consideration of a sale of some interest in a patent right for the steam washing machine," which was all the evidence given in the cause.

The case presents the single question: Upon which of the parties devolved the *onus probandi*?

There are certain rules of evidence upon this point, to some of which it may not be improper to advert. Thus, "that the party who alleges the affirmative of any proposition shall prove it:" 1 Stark. Ev. 376; Bull. N. P. 298; Roscoe on Ev. 51. "That the affirmative is always to be proved by those whose interest it is to prove it; and that proof of that fact which operates in discharge of the other party, lies upon him:" *Ross v. Hunter*, 4 T. R. 37, 38. "That in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant." "Where the presumption of law is in favor of the affirmative, as where the issue involves a charge of culpable omission, it is incumbent on the party making the charge to prove it, although he must prove a negative; for the other party shall be presumed innocent until

proved to be guilty:" *Monke v. Butler*, 1 Roll. 83; *Marsh v. Horne*, 5 Barn. & Cress. 322; Roscoe on Ev. 52.

The action is founded on a note, and as that imports a consideration, its production was all the evidence required on the part of the plaintiff, unless, indeed, its consideration was impeached, and rebutting testimony rendered necessary; from which it follows that unless evidence in support of a plea impeaching the consideration be adduced, the plaintiff may rest his case upon the note itself.

The second and third pleas are special, and present, as a defense to the action, a failure of consideration, and fraud on the part of the payee. Fraud is never presumed, and proof is as necessary to establish it as is the averment of its existence as a defense. The matter relied upon in each plea is clearly affirmative, and to compel the plaintiff to disprove such averments would be a departure from those rules of pleading to which we have adverted. The ground of the defense is fraud, and upon its establishment the action is barred. As fraud is never presumed, it was obviously the duty of the defendant to prove it.

We will notice the proof adduced. The plaintiff, on examination, says: "He believes the note was given in consideration of a sale of some interest in a patent right for the steam-washing machine;" and here the evidence closed. This evidence does not support the second plea. Neither failure of consideration nor fraud is shown. If it have any weight, it must be in its application to the third plea. The sale of an interest in a patent right is not *per se* evidence of fraud. The presumption of fraud being inadmissible, and it not being committed by the mere sale of an interest in a patent right, unconnected with other acts by the vendor, if such acts occurred, their proof was necessary. If, however, as contended, a plea, averring fraud in the sale of a patent right, throws the proof of a patent having issued, and the right to vend it, on the plaintiff, then there would appear some ground for the application of the evidence, noticed to the third plea; but this is not admitted, nor do we perceive any difference between the sale of the patent-right and that of any other property. In the present case, if fraud was practiced in the sale, or a patent sold without title by the vendor, evidence of this description should have been adduced by the defendant.

We therefore think a new trial should have been granted.

By COURT. The judgment is reversed with costs. Cause remanded, etc.

MUIR v. CRAIG.

[3 BLACKFORD, 293.]

A PURCHASER AT SHERIFF'S SALE of land to which the debtor had no title, can, even in the absence of fraud, recover in equity from such debtor the amount paid to the sheriff.

ERROR to the Ripley circuit court.

J. Test and A. Lane, for the plaintiff.

G. H. Dunn, for the defendant.

BLACKFORD, J. This was a bill in chancery filed by Muir against Craig. The bill charges that one Jennings had obtained judgment against Craig for three hundred and seventy-nine dollars and ninety-two cents; that execution was taken out on that judgment; that the sheriff levied the execution on a certain tract of land supposed to be the property of Craig; that the complainant, believing the land to be Craig's, purchased the same at the sheriff's sale for two hundred and ninety-five dollars, paid the purchase money, and received the sheriff's deed. The bill further charges that Craig, both on and before the day of sale, represented the land to be his; that the land in reality belonged to the United States and not to Craig; and that the sheriff's sale and deed conveyed no title to the complainant. The object of the bill is to compel the defendant, who is the judgment debtor, to refund to the complainant the amount of the purchase money for the land paid by the latter to the sheriff.

The answer denies all the particulars of fraud charged, but it admits the other material facts stated in the bill. There was a supplemental bill filed, but the cause does not require a particular notice of it. There are a number of depositions in the record, but they leave the case in the same situation substantially in which it previously stood upon the bill and answer.

The circuit court dismissed the bill at the complainant's cost.

The question which is presented by this case is, whether the purchaser at sheriff's sale of land to which the execution debtor had no title, but which belonged at the time to the United States, can recover from the debtor in equity the amount of the purchase money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor?

We find this question, so far as it could arise in a case of the sale of a negro, decided in the affirmative by the court of appeals in Kentucky, in *McGhee v. Ellis*, 4 Litt. 244 [14 Am. Dec.

124]. Our opinion is in accordance with that decision, the principle of which must, we conceive, be applicable to the case of the sale of land. Craig's debt to Jennings, as to two hundred and ninety-five dollars, has been paid by Muir. The consideration for that payment, viz., the land sold by the sheriff to Muir as Craig's property, has entirely failed. Muir must be entitled under the circumstances of the case to recover in equity from Craig, who has received the benefit, the purchase money paid to the sheriff for the land, with interest. The decree of the circuit court, in favor of the defendant, is erroneous and must be reversed.

By COURT. The decree is reversed, with costs. Cause remanded, etc.

The rights and remedies of purchasers at sheriff's sale, on failure of title are discussed in the note to *McGhee v. Ellis*, 14 Am. Dec. 181.

JUDAH, ADM'R, v. DYOTT.

[3 BLACKFORD, 324.]

DEMAND FOR AN ACCOUNT OR PAYMENT must precede an action against an agent or factor, by his principal, for the proceeds of goods sold by the former on commission.

STATUTE OF LIMITATIONS DOES NOT COMMENCE in favor of a factor until demand for payment or accounting is made on him.

ERROR to the Marion circuit court.

C. Fletcher, for the plaintiff.

S. Merrill and J. H. Scott, for the defendant.

BLACKFORD, J. *Indebitatus assumpsit* by Dyott against Judah, administrator of Brandon. Two counts: one for goods sold and delivered to the intestate; the other for money had and received by the intestate to the plaintiff's use. There was a third count, stating a promise by the administrator to pay the debt; but to that count a *nolle prosequi* was afterwards entered. Two pleas: the general issue, and the statute of limitations. Issue on the first plea. Replication to the second plea and issue. Verdict for the plaintiff below. Motion for a new trial overruled, and judgment on the verdict.

The proof was that Brandon had a certain quantity of medicines in his possession belonging to Dyott, which the former had received from the latter, to be sold on a commission of

twenty-five per cent.; and that Brandon sold the principal part of the medicines, if not the whole, before his death.

This evidence was not sufficient to maintain the action. Brandon was merely the agent of Dyott for the sale of the medicines, and was not liable to his principal for the proceeds of the sale, without a special demand previously made; nor is his administrator liable, without a previous demand on himself or his intestate. When goods are received to be sold on commission, the law implies a contract, if no other be expressed, that the agent shall not be liable for any amount received for the sale, until a demand of payment has been made. It is true, positive evidence of the demand is not always required. The circumstances proved may sometimes be such as will authorize a jury to presume a demand. But in the case before us there was no kind of evidence that a demand, either on the intestate or on his administrator, had been made before the commencement of the suit; nor were there any circumstances proved, from which any such demand could be presumed. The action, therefore, was not sustained by the evidence: *Topham v. Braddick*, 1 Taunt. 572; *Armstrong v. Smith*, May term, 1833.

The statute of limitations was pleaded in this cause; but the record presents us with no question relative to that plea, which it is necessary to decide. It may not be improper, however, to observe that as the cause of action does not accrue, in cases like the present, until a demand, the statute of limitations can not be said to commence running until after the demand: *Topham v. Braddick*, 1 Taunt. 572.

Whether in these cases against a commission merchant, the contract should not be specially declared on, or whether the evidence rendering him liable may be introduced under a general count, is a question which we are not called on now to decide. We conceive that, let the point as to pleading be what it may, the question as to evidence is very clear. The plaintiff having failed to prove a demand of the money sued for, was not entitled to the verdict he obtained; and the new trial applied for by the defendant ought to have been granted.

By COURT. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

HANLY AND SHRIEVE v. BLACKFORD.

[1 DANA, 1.]

SPECIFIC ENFORCEMENT OF A CONTRACT IN WRITING for the sale of land, which contains no description or reference identifying the land, can not be decreed consistently with the statute of frauds.

PURCHASER OF LAND WHOSE DEED RECITES that the land was sold as the property of the obligee in a bond, is estopped by such recital to deny the title of such obligee.

LAND DESCRIBED IN A DEED AS TEN ACRES, "adjoining him (the vendee) on the north," is properly laid off, by extending it as far upon the northern boundary as the vendor's land extends.

DEPOSITIONS TAKEN UPON NOTICE TO SOME, but not all the adverse parties, may be used against those who had notice.

FAILURE TO ANSWER ADMITS the allegation of a bill, without any proof thereof.

DECREES WILL NOT BE REVERSED for the improper admission of a deposition, if there is other proof to support it.

NEITHER THE REMOTE GRANTOR, from whose vendee the contending parties both derive title, nor his heirs, are necessary parties to a suit between such contending parties affecting the title to the land.

BILL in chancery. Appeal from the circuit court of Jessamine county. The facts are stated in the opinion.

Hewitt, for the appellants.

Owsley, for the appellee.

By Court, **ROBERTSON, C. J.** In the year 1800, Benjamin Blackford bought from William Conner ten acres of land, described in the bond of that date for a title, "as adjoining him (Blackford) on the north," without any other designation of boundary or locality. But ten acres were "laid off" to him,

bounded on the north by the land on which he lived, and on the west by the road from Nicholasville to Lexington; and of the whole of which he retained possession and exclusive use from 1800 to some time in 1828, when John H. Hanly inclosed a part of it, which he claims under a deed from William Shrieve to him, for twenty-eight acres and three quarters, which had been conveyed to Shrieve, in 1814, by Fisher Rice, William Conner, and the sheriff of Jessamine, in consequence of a sale under *ieri facias* against Rice and Conner, which had been levied on the land as the property of Conner.

Blackford, having paid for the ten acres which he bought from Conner, filed a bill in chancery against Hanly, Shrieve, Conner, and Jefferson Rice, from whom, as devisees of Fisher Rice, he had obtained a conveyance, in 1821, praying, among other things, that Hanly should be compelled to relinquish to him all his claims or title to the ten acres or any portion thereof, and alleging that Fisher Rice had, in 1794, sold and covenanted to convey to William Conner one hundred acres of land, including the said ten acres; that Conner had paid for the hundred acres, and had resided thereon from 1794 until since the sheriff's sale in 1814; that the said ten acres were publicly and explicitly excepted in the sale by the sheriff, and it was clearly understood that the sale of the twenty-eight acres and three quarters was not to interfere with the ten acres, or disturb his (Blackford's) right thereto; that Shrieve, when he had purchased the twenty-eight acres and three quarters, had full notice of all the foregoing facts, and that Hanly had the like notice when he purchased from Shrieve, and never put up any claim to any part of the ten acres until 1828.

Hanly's answer does not deny the alleged notice; but Shrieve's answer denies that he had notice as charged. The truth of the allegations as to the manner of selling the twenty-eight acres and three quarters, and as to Shrieve's notice thereof, and of Blackford's claim and possession, is, however, sufficiently established by the depositions read on the hearing of the cause. The circuit court decreed that Hanly should convey to Blackford, by deed of "quitclaim," all title to any part of the ten acres as claimed by the latter. To reverse that decree, Hanly and Shrieve have prosecuted this appeal.

The chief objection which has been made to the merits of the decree is, that it is in defiance of the statute against frauds and perjuries, because, as the covenant from Rice to Conner does not designate the hundred acres which were to have been

conveyed, and as the bond from Conner to Blackford does not designate the precise position of the ten acres, the true locality can not be given to either tract without resorting to a species of testimony interdicted by the statute. This objection is, on a superficial view, specious and imposing; but it will not stand the test of a more thorough scrutiny.

The bond from Rice to Conner contains no description or reference which could furnish a clue for identifying the land of which it acknowledges the sale; and it may therefore be conceded that, as between Rice and Conner, or as between any person holding as a *bona fide* purchaser from Rice, and any other person claiming under Conner, a specific execution of the contract between Rice and Conner could not be decreed consistently with the statute. But Hanly does not stand in the attitude of a *bona fide* purchaser from Rice. The recital in the deed from Rice, Conner, and the sheriff, shows that the land was sold as the property of Conner. This is surely a sufficient recognition in writing of the title of Conner, and must operate as an estoppel against Rice and Shrieve, and Hanly as purchaser from Shrieve.

It is not material whether Conner acquired his right to the land from the vague bond alone, which has been exhibited, or from some other source, or in some other mode. The deed to Shrieve operates as plenary and conclusive proof against Rice, Shrieve, and Hanly, that Conner, and not Rice, was the true owner of the land, in equity at least, and that Shrieve acquired his title—equitable, if not legal—from Conner alone; and consequently both he and Hanly are estopped to deny Conner's title at the date of the sheriff's sale. As, therefore, both Shrieve and Hanly had notice of Blackford's contract, and as his ten acres were excepted from the sale, the statute against frauds and perjuries can not be applied in their behalf, unless the bond to Blackford is insufficient.

Blackford's tract of land lies on both sides of the road leading to Lexington, and the ten acres which he bought from Conner (and as always claimed by him, and as decreed), lie altogether on the east of the road, and adjoin his original tract on the north, in its whole extent from the road eastwardly. The appellants insist that, according to the bond, the ten acres should be so laid off as to adjoin Blackford's tract on the north, to the whole extent of his northern boundary, on both sides of the road, and that, by thus placing his ten acres, there will be no interference with Hanly. But an important fact, decisive on this point, seems to have been overlooked by the appellants: it

is, that the whole of Conner's land lay on the east of the road, and consequently "ten acres adjoining Blackford on the north" must necessarily lie altogether on the east of the road, and should, as decreed, be bounded on the north by the dividing line between Conner and Blackford as far as their tracts were thus coterminous; and it thus appears, not only that the ten acres were sufficiently described in the bond, but that they have been properly bounded by the decree of the circuit court.

The appellants also insist that some depositions, to which they objected, were improperly permitted to be read on the hearing, and that all the proper parties were not made. But neither of these objections can have any effect on the decree. The only objection to the depositions (except that of Jameson) was that the notice was served on the appellants only. The circuit court decided that the depositions thus taken were evidence against the appellants only, and to that extent they certainly were admissible. No proof was necessary against Conner, because, by failing to answer, he admitted the allegations of the bill. Nor was any proof against J. Rice necessary, not only for the same reason, but also because the deed of 1814 was conclusive on his father, and on all persons claiming under him. As the proof of the bond from Rice to Conner was rendered immaterial by the estoppel in the deed of 1814, and the sheriff's sale, and the notice to Shrieve and Hanly, the decree, authorized as it was by the facts, independently of any proof of that bond, should not be reversed, even if the circuit court erroneously permitted Jameson's deposition to be read to prove the genuineness of the bond.

And it also appears from the foregoing view that there is no defect of parties. Fisher Rice would not, had he been living, have been a necessary party, because he had acknowledged, by the deed of 1814, that Conner owned the land, and consequently the heirs of Fisher Rice could not have been necessary parties in any view of the case, as presented by the record.

Wherefore, it seems to this court, that the decree of the circuit court is right, and should be affirmed.

SPECIFIC PERFORMANCE OF CONTRACTS.—This subject is considered at length in *Seymour v. Delancy*, 15 Am. Dec. 207, note 303. See, as to the specific enforcement of voluntary agreements, *Anderson v. Green*, 23 Id. 423, note.

RECITALS IN DEEDS, WHEN THEY OPERATE AS ESTOPPELS.—This subject is considered in the note to *Graff v. Castleman*, 16 Id. 754.

NOTICE BY RECITALS IN TITLE PAPERS.—*Lodge v. Simonton*, 23 Id. 48, note.

WILSONS v. BIBB.

[1 DAMA, 7.]

PLEA OF *LIBERUM TENEMENTUM* asserts title to the *locus in quo* in defendants. IN TRESPASS Q. C. F. UNDER SUCH A PLEA, and issue thereon, evidence of paramount title in either party is admissible.

RECORDS, PAPERS, ETC., BEARING UPON THE QUESTION OF POSSESSION are admissible under a plea of *liberum tenementum*.

ACTION OF TRESPASS Q. C. F., IS FOUNDED upon the actual possession of the plaintiff; but if defendants have title, the damage done to the close is no injury to the possessor, who has no right.

POSSESSION ALONE IS SUFFICIENT to maintain the action against all the world, except the rightful owner.

JUDGMENT WILL NOT BE REVERSED because relevant testimony has been admitted at an improper time.

POSSESSION IN THE PLAINTIFF AT THE TIME OF THE INJURY, or when the action is brought, is necessary to enable him to maintain trespass q. c. f.

DEFENDANT BEING IN POSSESSION, although tortiously, will prevent a recovery in such an action.

TRESPASS. Appeal from the circuit court of Harrison county. The opinion states the facts.

Wickliffe and Wooley, for the appellants.

John Trimble, for the appellee.

By Court, UNDERWOOD, J. Bibb instituted an action of trespass *quare clausum fregit* against the Wilsons. They pleaded not guilty, and *liberum tenementum*. In the progress of the trial, Bibb offered in evidence a patent to Samuel Meredith of elder date than that under which the appellants claim, covering the *locus in quo*; the transcript of the record of an action of ejectment in the federal court for the Kentucky district, *Meredith's Lessee v. Pickett and others*; a copy of the decree of the general court, in favor of Bibb against certain persons as heirs of said Meredith, for two thirds of the land granted to him; and a plat of survey with field-notes and other papers, showing a division of Meredith's thousand acres between his heirs and Bibb.

Whether these papers, or any of them, were admissible, is made a question for our decision.

After the evidence was concluded, the court, at the instance of the plaintiff, instructed the jury, "that if they believed the plaintiff had possession of the premises in the declaration mentioned, at the time the trespass was committed, either by himself or his agent, such possession is sufficient to maintain the action against the defendants, unless the defendants had the

legal title to said premises." The defendants excepted to this instruction. After the argument was concluded, the defendants asked the court to instruct the jury, "that if they believed, from the evidence in the cause, that the defendants, at the time the supposed trespass was committed, and at the commencement of this suit, were in the actual possession of the premises upon which the trespass was alleged to have been committed, whether that possession was rightful or tortious, the plaintiff can not recover in this action." The court gave the instruction thus asked, with this qualification: "Provided that the jury also believed from the evidence that the plaintiff acquiesced in the possession of the defendants." The defendants excepted to the qualification. Whether the court decided correctly or not, in giving the above instructions, are questions for consideration.

The plea of *liberum tenementum* affirmed that the defendants had title to the *locus in quo*. Issue was taken on the plea by denying the title thus affirmed. The exhibition of Meredith's patent was unnecessary until after the defendants had attempted to show title in themselves; but after that had been done by reading the patent to Waller Cook and Montjoy, and the conveyances down to the ancestor of the defendants, it was clearly proper then to have admitted Meredith's patent to show a title paramount to that under which the defendants claimed. The action of trespass *quare clausum fregit* is founded upon the actual possession of the plaintiff, but if the defendants have title, the damage done to the close is no injury to the possessor, who has no right. The possession alone is sufficient to maintain the action against all the world, the rightful owner excepted. If Bibb was possessed, he might bring his action founded on the possession. If the defendants under the plea of *liberum tenementum* attempted to show title in themselves, such attempt might be legally frustrated by showing the paramount title of Meredith. We do not perceive any error in admitting Meredith's patent as evidence, unless it be that it was offered at a time when it need not have been. But for such a cause we would not reverse, when the subsequent proceedings showed its relevancy.

As it respects the record of the action of ejectment in the federal court, the proceedings in the general court, and the plat and papers relative to the division between Bibb and the heirs of Meredith, their admissibility is more doubtful, but we have come to the conclusion that they were admissible, because they had a bearing upon the question of possession.

The recovery in the action of ejectment took place in 1806. Picket, the vendor of the ancestor of the defendants, was a defendant in the ejectment suit. The declaration and notice were served on him in 1804. He conveyed to the ancestor of the defendants in 1807; and the proof is that their ancestor took possession about that time. The term of the demise laid in the declaration is fifty years. Now, for aught that appears to us, the judgment in ejectment may yet be enforced, so as to remove those claiming under Picket. If James Wilson, ancestor of the defendants, chose (by way of compromise, as the proof conduces to prove he did) to surrender the possession of the forty-one acres of land to Bibb, in 1824, before he had been twenty years in possession under his deed, and when there was judgment of eviction against his vendor, it amounts to a breach of that continuity of possession upon which the defendants rely for protection under the junior grant. And this leaves the elder grant of Meredith to have its full effect in falsifying their plea.

There is no proof that the persons against whom Bibb obtained his decree in the general court were the heirs of Samuel Meredith, the patentee. The whole record is not transcribed. We can not say whether the allegations of the bill are sufficient to show that the case was proper for the jurisdiction of the general court. The decree, therefore, does not in the least tend to show any title in Bibb. But taking the decree which was rendered in August, 1823, in connection with the partition made in June, 1824, by McCarty, the surveyor, and Montjoy and Fugate, the commissioners, between Bibb and those called the heirs of Meredith, and of all which, from the testimony, the ancestor of the defendants was apprised, we think the decree and plat legitimate evidence to show the extent of Bibb's possession, and the ground on which he intended to take possession; and for this purpose alone we admit them under the present aspect of the record.

We perceive no objection to the instruction given on the application of Bibb. The qualification or proviso added by the court to the instruction asked by the defendant, after the conclusion of the argument, is erroneous; and for that cause the judgment must be reversed.

If the plaintiff neither had possession at the time the injury was done to the freehold, nor at the time suit was brought, he could not recover. Whether an intermediate possession would, in any case, sustain the action for a previous trespass, need not

be decided; for the evidence shows no such possession in the present case, and the instruction, as given, applied to the evidence. The proviso added by the court would allow the plaintiff to recover, although the possession in fact was with the defendants continually. Such is not the law. If the defendants or their ancestors had regained the possession in fact, and were actually in possession at the time the supposed trespass was committed, and so continued up to the institution of the suit, the action of trespass *quare clausum fregit* could not be maintained against them.

Whether Bibb did or did not acquiesce in the possession of the defendants, can not operate so as to subject them to the action. It is laid down that "the disseisee of land may maintain an action of trespass *quare clausum fregit*, for an injury done to the land before he was disseised." It is also said "not to be necessary that the person who brings the action of trespass *quare clausum fregit* for an injury to the land, should be in the actual possession thereof at the time of bringing the action." See Bac. Abr., tit. Trespass, letter E.

We know of no case where a person out of possession at the time of the trespass committed has sustained the action of trespass *quare clausum fregit*, when he never regained the possession after the trespass. Whether by regaining the possession he would be entitled to his action is not now the question. The proviso has made the law depend upon Bibb's acquiescence in the possession of the defendants, and we know of no principle to support the position.

Wherefore, the judgment is reversed, with costs.

TRESPASS.—As to the title necessary to maintain, see *Hostler v. Skull*, 1 Am. Dec. 587; *Putnam v. Wyley*, 5 Id. 346; *Carson v. Noblet*, 6 Id. 554. Person must be in possession to maintain: *Foster v. Fletcher*, 18 Id. 208. Possession of part of a tract of land is not sufficient to maintain trespass for cutting timber on another part: *Buck v. Aikin*, 19 Id. 535. In the case of *Orser v. Storms*, 28 Id. 546, the possession necessary to maintain trespass in case of chattels is discussed at length.

ALLIN, EX'R OF WILLIAM SHADBURNE, v. THOMAS SHADBURNE'S EX'R AND HEIRS.

[1 DANA, 68.]

ACTION MAY BE MAINTAINED AGAINST ONE OBLIGOR, upon a joint bond of himself and another; and such bond is sufficiently described in the declaration, either as the bond of the defendant alone, or as the bond of both.

THAT THE OBLIGOR AND OBLIGEE are the same person, is not a legal deduction from the identity of the names.

ACTS OF AN OBLIGEE WHICH SUSPEND HIS CAUSE OF ACTION against a joint obligor, generally release the cause of action as to such obligor; as where he marries the obligor, or where he appoints such obligor his executor.

RELEASE OF ONE JOINT DEBTOR, is a release of all.

JOINT BOND EXECUTED BY TWO PERSONS, and made payable to one of such persons, is void as to the latter, and is in effect the sole obligation of the other, against whom the obligee, although named in the bond as a co-obligor, may maintain an action at law to recover the amount thereof.

EACH OBLIGOR IN A JOINT OBLIGATION is bound *in solido* for the whole undertaking.

TWO PERSONS, WHO JOINTLY OWN A DEBT, and execute a bond for its payment, payable to one of such persons, he who is alone liable at law upon such bond, will be relieved in equity, against the payment of more than his share of the debt, to the obligee, who is his co-obligor.

SAME PERSON CAN NOT BE BOTH OBLIGOR AND OBLIGEE in the same undertaking, nor both plaintiff and defendant in the same action.

DEBT. Appeal from circuit court of Nelson county. The facts are stated in the opinion.

Monroe, for the plaintiff.

Crittenden, contra.

ROBERTSON, C. J. The appellee, James Allin, as surviving executor of William Shadburne, deceased, sued the appellants, as the executor and heirs of Thomas Shadburne, deceased, in debt, upon a bond executed to the said Allin and another as executors of William Shadburne, by Thomas Shadburne and James Allin. The declaration contains two counts: the first describes the bond as an obligation by Thomas Shadburne only; the second describes it as an obligation signed by Thomas Shadburne and James Allin. The bond, as exhibited upon oyer, purports to have been signed by both Thomas Shadburne and James Allin.

The appellees demurred to the declaration and filed a plea in bar averring that James Allin, the obligor, and James Allin, the obligee, were but one and the same person. The circuit court overruled the demurrer to the declaration; and having also overruled a demurrer to the plea, rendered judgment against the appellant; to reverse which this appeal is prosecuted.

We can not perceive any ground for demurring to the declaration, unless the appellants (erroneously) supposed that the first count was defective, because it described a bond with two signatures as the obligation of only one person; and that the second count was not good, because it averred that "James

Allin " was one of the obligors. But neither of these objections can have any influence. There is no necessary discrepancy between the bond as declared on and as exhibited; the simple fact that the name of James Allin appeared to be subscribed does not show that he is an obligor, and can not be available on demurrer. Nor is it a legal deduction, from the identity of names in the second count, that "James Allin," the obligor, is "James Allin," the obligee. Wherefore, as the declaration appears in all respects to be substantially good, the demurrer to it was properly overruled.

The plea can not be aided by the familiar doctrine as to "confusion of parties," because the same person was not both plaintiff and defendant. Nor can it be sustained on the ground of a release of the cause of action, by operation of law. When a legal cause of action once subsisting has been suspended by the voluntary act of the party who was entitled to it, it is, in most cases, considered as released by law. Thus, if the obligee marry the obligor, and thereby suspend the cause of action, the law deems the marriage a release of the legal obligation. So if a creditor make one of several joint debtors, or joint and several debtors, his executor, and the executor qualify as such, the whole legal obligation is thereby extinguished; for, as an executor can not sue himself, the creditor by appointing one of his debtors his executor voluntarily suspends, and thereby, in contemplation of law, releases the cause of action as to such debtor, and a release to one operates as a release to all.

Consequently, if the bond in this case had been given to the testator (William Shadburne), the subsequent appointment of one of the obligors to be his executor would, by operation of law, have released both of the obligors from their prior legal liability. But James Allin could not make a contract with himself. The *aggregatio mentium*, indispensable to the making of a contract, forbids the idea of an agreement between James Allin in his individual, and the same James Allin in his fiducial character. As to him, therefore, there never was any legal cause of action, because there never was any contract imposing on him any legal liability. And consequently, as to him, there was nothing to release; and surely the fact that he was never bound, could not have operated as a release of the obligation of Thomas Shadburne.

If, therefore, the plea can be sustained, it must be only because the entire contract was a nullity, in consequence of its invalidity as to Allin as a co-obligor. But can such a position

be maintained by either authority, principle, or analogy? We think not. We have seen no direct authority upon the point, unless it can be found in *Debard et al. v. Crow*, 7 J. J. Mar. 7 [22 Am. 113]. In that case this court expressed the opinion that the legal liability of a principal obligor, in a joint and several obligation, was not affected by the fact that his surety was one of the obligees; but that, in such a case, the obligation was of the principal only. There would be no difference between that case and this, if the bond in the latter had been joint and several, instead of being, as it is, joint; and if, also, it had shown on its face that Allin was only a surety. But these discrepancies in the characters of the two cases are not so essential as to subject them to the operation of different principles. The same principle must, in our opinion, govern both cases.

If a principal obligor in a joint and several obligation could not bar an action against himself alone, by pleading that another person, who subscribed the bond as his surety, was obligee, and therefore not bound as a co-obligor, why should a principal in joint bond bar a suit against himself alone by a similar plea? In each case the bond would, according to its legal effect, be the obligation of the defendant only; and that is the reason why he could not avoid it by pleading that another person who signed it as his surety was not bound in law. The reason why the surety is not bound is not material to his principal, to whom the same reason does not apply. Infancy, coverture, duress, or the fact that the obligee and surety are identical, and therefore can not make a contract, would each be legal cause for exonerating the surety; but they are all personal, and no one of them would affect the principal obligor, to whom none of them applied.

In a joint obligation, as well as in a joint and several obligation, each obligor who is bound at all is legally liable *in solido* for the whole undertaking. A party to a contract who was free from personal disability and fraud, and who for a binding consideration freely agreed to be bound, should not be exonerated merely because another person, who had no legal capacity to bind himself, had in form been associated with him as an apparent co-obligor. Allin could not make a contract with himself, only because he and himself are not two persons; his incapacity was personal, and did not apply to Shadburne. Allin, on one side, and himself and Shadburne on the other, were in fact and in law, only Shadburne as one party, and Allin

as the other party to the contract. Two minds only were engaged, and only those two consented. Why is not the contract legal and binding? And why is not the sole obligation of Shadburne just as it would have been if a *feme-covert*, idiot, or slave had signed with Shadburne as a co-obligor? Even if he and Allin jointly owed the consideration of the bond, the legal effect of the undertaking seems to be that he is bound for the whole amount. It is his obligation, entered into freely, and for a legal and valuable consideration; and the fact that the obligor justly owes one half can not extinguish the obligation, or alter its legal effect as a sole liability for the whole.

In such case the sole legal liability would be co-extensive with the entire undertaking, and even a plea to the consideration would be unavailing at law. But a judgment for the whole amount of the bond might be enjoined in equity, and the obligor exonerated, by decree, from paying to the obligee more than his part of the consideration, or original debt, for which he was justly responsible prior to the execution of the bond.

But the bond itself could not be void, and therefore must impose a legal obligation on the sole obligor for its whole amount. Whether the consideration be joint or several, partial or commensurable, can not be essential to the legal character and effect of the obligation. It must be either totally void, or a sole liability for the whole amount. We can not perceive any reason why it should be void. There was a competent obligor and a competent obligee. There is no question of fraud, or duress, or of a want of consideration. Allin was never bound as an obligor, because he had no legal capacity to bind himself. Shadburne had such a capacity, and agreed to be bound. He must be presumed to have known that Allin would incur no legal liability (if such be the law), because every person of legal capacity to make a contract is presumed to know the legal character and effect of that contract. He should be presumed therefore to know when he signed the bond that Allin incurred no legal responsibility as a co-obligor, and that consequently the bond would be binding on himself alone. Knowing, or being presumed to have known, these things, he can not be permitted to object to a suit on the bond according to its legal effect, and according to his presumed understanding of it when he signed it.

In *Thomas v. Thomas*, 3 Lit. 8; *Saunders' Heirs v. Saunders' Executors*, 2 Id. 321; *Allen v. Gray*, 1 Mon. 98, and *Gatewood v. Lyle*, 5 Id. 6, this court decided only that the same person

could not be both obligor and obligee, and could not be both plaintiff and defendant in the same action. But not only is there no intimation in any of those cases that such a bond as that which we are considering would be void, but there is an implied admission in all of them that it would be binding on an obligor who is not also an obligee, and that a suit at law could be maintained on it against those, but those only, who may be bound. If such had not been the opinion of the court, it is reasonable to presume that, instead of arguing to prove that in consequence of a confusion of parties to the action, it could not be maintained, the court would at once have said that the bond was void altogether, and therefore that no suit at law could be maintained upon it.

In *Allen et al. v. Gray*, *supra*, Paul Skidmore and others had signed a bond to Paul Skidmore and other different persons. The suit was brought in the names of all the obligees, against Paul Skidmore and others, and the counsel for the plaintiffs having endeavored to show that, as the suit had been abated as to Skidmore, the action could not be maintained, this court said: "It is true the replication of the plaintiffs, to which the defendants demurred, and which was adjudged insufficient by the court below, alleges that after the action was commenced, and before the defendants appeared and pleaded, Skidmore departed this life, and the action as to him was abated; but if the principle of law be as we have supposed (that is, that Skidmore could not be both plaintiff and defendant), the action was irregularly commenced, and being erroneous in its origin, the error can not have been cured by the subsequent abatement." Here is an obvious admission, tacitly and virtually, that if the suit had not been originally brought against Skidmore, it might have been maintained. But in *Debard et al. v. Crow* [22 Am. Dec. 113], that point has been directly so decided; and we have not been able to find a single authority, or even *dictum*, to the contrary. And consequently, as principle and analogy seem to sustain the doctrine ruled in *Debard et al. v. Crow*, we have no disposition to overrule or unsettle it.

In this case, if, as is probable, Allin signed the bond as surety only, then the case would stand thus: as an executor was willing to be the surety of a debtor to the testator's estate, or, in other words, was willing to dispense with security, therefore, and therefore only, the debtor insists that his own bond is void; that is, that it can not be enforced against him, because he gave no security, or because his surety was not bound, in

consequence of personal or legal incapacity to bind himself. But whether Allin signed the bond as surety, or as co-principal, is not essential. In either event, Thomas Shadburne was sole obligor, and the bond has, as to him, precisely the same legal efficacy as it would have had if Allin had never signed it.

This conclusion appears to accord with principle, analogy, authority, and justice, all of which seem to oppose the opposite doctrine.

There is no confusion of parties; there has been no release, by operation of law, of any pre-existing legal liability; the bond, according to its legal effect, was, *ab origine*, a sole and legally binding contract, by Thomas Shadburne, to pay the whole amount; it imposed no legal obligation on Allin; the suit is brought upon the bond, as the sole obligation of Shadburne; and consequently, the circuit court erred in overruling the demurrer to the plea.

Wherefore, it is the opinion of this court (Judge Nicholas dissenting) that the judgment of the circuit court be reversed, and the cause remanded, with instructions to sustain the demurrer to the plea.

NICHOLAS, J. (dissenting). This case may, in effect and substance, be fairly and briefly stated thus: Thomas Shadburne and James Allin executed a joint obligation to said Allin, for the payment of money, who now seeks a recovery of the whole amount from Shadburne, by an action on the bond. There is nothing to show that one was principal and the other surety, or to destroy the necessary, usual, and legal inference from all joint contracts, that they mutually and equally participated in the benefit of whatever it was that constituted the consideration of the obligation, even if such matter, had it been shown, could have any influence in the determination of the question of Shadburne's liability, which it is not conceded that it could. That Allin can not have a right to maintain an action on this obligation against Shadburne, strikes my mind with the force of a self-evident proposition; but, like most other propositions of that sort, it may be very difficult to prove it to another mind by deduction from any regular chain of reasoning. His right to maintain the action is admitted to be unsustained by any precedent, except that of *Debard v. Crow*, which is still in the power of those who made it, to revoke as an authority. The cases referred to, of *Allen v. Gray*, *Saunders v. Saunders*, etc., will be found, on examination, to have no bearing whatever upon this, and not to contain the slightest intimation in favor of the right

to recover here. The case must have often occurred, from the awkward efforts of ignorant men to reduce their agreements to writing; and as the books furnish no trace of any adjudication, or even *dictum*, recognizing the right to maintain such action, it is very persuasive evidence of the non-existence of such right. I can not perceive how it is to be maintained upon any established legal principle, or any of those analogies, upon which it is attempted to be based.

It is attempted to be likened to cases of joint contract, where one of the contractors is a married woman, a lunatic, or an infant. But the resemblance is not discerned, nor can it be admitted. In those cases, the sole liability of the other joint contractor is allowed on the ground, that, as to the *feme*, the lunatic, or the infant, it was void or voidable, from a want of capacity to make an obligatory contract. Here there is no natural or legal incapacity on the part of Allin to contract, but merely the incapacity common to all, of contracting with himself. Can he, laboring under no disability to contract, after having induced another to enter into a joint contract with him to himself, be permitted to allege his own disability to contract with himself, as a ground of exemption from his share of the obligation, and thereby cast its whole burden upon the other, as if it had been the sole contract and separate liability of that other? Reason and justice will promptly answer no. I think their response is the response of the law also. If he can be permitted so to do, it is a solitary and anomalous instance where the law fails to estop a man by his own free and voluntary act.

The legal, as well as natural presumption from this, like all other joint contracts, being that the co-obligors were joint and equal participants in the benefit which induced the giving of the joint obligation, Allin can, in justice, recover from Shadburne no more than a moiety of the obligation. But if it be sustained as a valid obligation against Shadburne, upon which Allin can recover anything, he must be permitted to recover the whole. How, then, is Shadburne to be relieved from the injustice of being compelled to pay Allin that moiety of the debt which Shadburne does not owe, but which, if it be due from any one, is due from Allin himself? There is no process known to the common law, by which he could be redressed. The recovery in this action must be forever final and conclusive between the parties, and after the collection of the money, in the course of this judicial proceeding, Shadburne

would never be allowed to recoup any part of it in any other suit between them concerning it. It is needless to inquire whether a court of chancery would interpose, and afford relief, in such case, for even if it be conceded that it would, that could by no means affect the question. The principles of the common law, as expounded in its own courts, are based exclusively upon its own mode and power of action in its own courts, without reference to the manner in which the matter might be treated of, or acted upon, in chancery. In looking to results, in order to ascertain the propriety of applying any principle of law so as to create a legal liability in a new case, those results depend, in the estimation of the law judge, exclusively upon the action of his own forum upon the subject. If the result so ascertained, operates manifest and irreparable injustice to one of the parties, that, of itself, conclusively shows, either that the supposed principle is unknown to the law, or that it is not properly applicable to the given case. So here the manifest and irreparable injustice of permitting Allin to recover from Shadburne, his, Allin's, own share of a joint liability, is an unanswerable argument to prove either that there is no legal principle, such as is here contended for, or that it is not properly applicable to this case.

It is no fair answer to this view of the subject to say the contract created a liability upon Shadburne, though it created none upon Allin, and that, therefore, it is only making Shadburne shoulder his own several liability, and not the joint liability of himself and Allin. This is a mere begging the question—a mere assumption of the liability of Shadburne, which is itself the thing to be proved. The rational deduction from the circumstances, as presented to us, is that Allin received a full share of the consideration upon which the obligation is based; and the true question is, whether the law, under those circumstances, will permit him to treat the obligation as a valid one against Shadburne, and recover its whole amount from him. The fair inference from the face of the contract, which is all that is given us to build even a conjecture upon, is that Allin and Shadburne, by a joint purchase, or otherwise, incurred a liability, which they supposed to be a joint one, to the executors of William Shadburne, and attempted to evidence that liability in an obligatory form, by executing a joint note to the executors, though Allin himself was one of them. If this attempt to create a joint legal liability be pronounced idle and inefficacious for any purpose, they each stand severally responsi-

ble to the estate of William Shadburne for their several portions of the debt, as if no such joint liability had been attempted to be created; and no injustice is done anywhere. But, if it be declared efficacious, so as to enable a recovery against Shadburne for the whole amount, it puts it in the power of Allin to wrong and defraud Shadburne to the amount of one half the debt; or under the most favorable view that can possibly be taken, drives Shadburne to his action to recover back from Allin the amount which Allin will thus have wrongfully collected from him, which, in a very supposable case, that is, of Allin's insolvency, by no means mitigates the hardship and injustice of the result. When such are the opposite results of these two modes of treating this contract, or attempt at a contract, it would seem to me that neither law, reason, nor justice can hesitate in making the election between them.

But it is said that Shadburne, being bound to know the law, must be presumed to have known that though Allin signed the note with him as a joint obligor, yet he was not bound thereby, and therefore he, Shadburne, understood that he was incurring and was willing to incur a sole, several liability for the whole debt. This argument, in addition to the objection that it contains an assumption of the thing to be proved, is liable to the further objection that it is a false deduction from its own premises. For though Shadburne knew that Allin was not bound, it does not follow that he either knew that he would be or was willing that he himself should be bound for the whole debt. He might well reply that he knew that they were both bound, or neither was, and if he had not known the law would not permit Allin to turn it into a sole liability upon him, he never would have signed a note for the whole. Or he might retort this reasoning on Allin and say, you know that where two, equally capable and willing to contract do, for a mutual consideration, enter into a joint obligation, they are equally bound, and if from any cause it is legally inoperative as to one of us it must be inefficacious as to the other also; and as you knew you could not contract with yourself, when you took our joint obligation to yourself, you knew it could have no legal effect, and therefore was willing it should not be obligatory on me. The one process of reasoning is as satisfactory and conclusive as the other, and equally well adapted to a rational result.

Strip the case of the immaterial circumstances of the contract being reduced to writing, and suppose it an attempt to create a joint parol agreement, for a consideration jointly received, to

pay Allin, as executor, a sum of money. It will not be pretended by any one that a recovery could be allowed against Shadburne upon such agreement for the whole amount. The law would pronounce such attempted joint contract a nullity, and in lieu of it would create an implied contract upon Shadburne to pay his half only of the debt. The same result must follow the contract when clothed in the form of a written obligation. It can acquire no validity from the mere circumstance of its being in writing. The legal impossibility of a man's making obligatory agreement for any purpose, by entering with another into a joint contract to himself, applies equally to either mode and renders such attempt utterly abortive.

The impropriety of making this writing obligatory upon Shadburne may probably be further and better illustrated by a few supposable cases. A., B., and C. are desirous that something shall be done or left undone by A., and to induce him thereto, B. and C. are each willing to incur a several responsibility of indemnity to the extent of one third the liability; but possessing no better information than Allin and Shadburne had of the proper mode of drafting legal obligations, they enter into an agreement like this: "We, A., B., and C., promise to indemnify A.," etc. Could A., upon such a covenant, be permitted to recover a full and entire indemnity from B. and C.?

Or suppose the obligee in a bond sign it with another, as joint sureties for the principal. In the event of the obligor's insolvency, could the obligee recover the whole amount from the other surety? Or suppose A. and B. enter into a joint obligation to the wife of A.; could A., in the name of himself and wife, recover the whole from B.? The ready response that must await each of these queries from every intelligent mind, upon principles of mere abstract justice, is, in my opinion, the response of the law also; and equally forbids the recovery by Allin of the whole of this debt from Shadburne.

Suppose A., B., and C. copartners in trade; that A. sells something to the firm, and receives from B. the note of the firm for the payment of the purchase money. Could he recover in an action upon the note against B. and C., or either of them? Certainly not against C., for B. had no authority to bind C. as his partner, except by a contract which would be mutually and equally obligatory upon the whole firm. Could he then recover from B. the whole amount, as upon his sole and separate obligation, after, by his acceptance of the note in that form, having recognized B.'s authority to use the name of the whole firm

in that way? It surely can not seriously be contended that he could. Then I ask for a discrimination to be drawn between that case and this. Every argument which is used to fasten a liability upon Shadburne, equally applies, and will as necessarily fix it upon B. Nor will it do to postpone the determination of that, nor any such supposable case. In the adoption of any new principle, or in the application of any supposed old principle to a new class of cases, we must look diligently around to see whither it is to lead us. If its destination is inevitable error, we are bound to pause and forbear its application. It is the duty of a judge to be ever timid in the pursuit of any path where he can find no footprint of a predecessor. I like not the maze into which I think I see that we are to be led by adopting the principles of the opinion delivered by the court, and must therefore withhold my assent.

If some effect must, perforce, be given to this contract, and Shadburne rendered liable upon it, much the most legal, as well as equitable turn to give it, would be to treat Allin's co-executor as sole obligee, and allow a recovery by him, or his representatives, against Allin and Shadburne both. I by no means concede that this could be done, but suggest it as the better and much the most plausible mode of giving effect to the contract, so as to bind Shadburne.

UNDERWOOD, J. (concurring with the chief justice). The principles which rule this case being questioned by Judge Nicholas, I am induced to state the grounds of my opinion. I shall do it in a few words.

"A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing." A man can not pass a consideration from himself to himself, and hence no man can make a contract with himself. The thing is impossible. All persons who execute written contracts as obligors must be regarded, if bound thereby, either as principals or sureties. A man can not as principal contract with himself, not only because he can pass no consideration to himself upon which to base the contract, but, likewise, because he is both morally and physically incapable of receiving from himself a payment of the debt contracted, and of coercing himself to perform by legal remedy. It is equally impracticable for a man to create an obligation to himself as the surety for another. He can not by any device of the sort make the debt due by the principal more safe. It is idle, therefore, to look upon a man as a surety to himself for the debt which another owes him.

In this case the question is, whether Shadburne is discharged from his written promise because Allin signed the instrument as co-obligor to himself. Allin's signature could impose no obligation upon him, to himself, for the reasons stated. How can his signature vacate Shadburne's covenant? If a consideration passed from Allin to Shadburne, then an essential ingredient to constitute a contract exists as between them, and a promise or covenant founded thereon ought in justice to be enforced. Why shall it be void if Allin performs the idle act of putting his signature to the instrument? If a stranger had forged his signature to the instrument, the forgery would not vitiate the contract, and exonerate Shadburne. Allin, by putting his name as an obligor, can no more make it a contract with himself, than if his name was forged. His signature, signed by himself or another, can neither benefit nor injure Shadburne. Wherefore, then, shall he be exonerated from the payment of the sum he has stipulated to pay, and for which, if he be principal, he has received an equivalent according to legal presumption? If he received no consideration, if he merely executed the instrument as surety for Allin, who, being executor, might have supposed that he could, in his individual capacity, execute an obligation to himself as a fiduciary, then, I think, Shadburne is not bound. He might defend upon the ground that there was no consideration, for if there be no consideration passing to the principal, none can pass to him who signs as surety merely. There is no debt which Shadburne can pay as surety for Allin, because Allin can not owe himself.

Those who enter into obligations with infants or *femes-covert* are bound by them, notwithstanding the infant co-obligor or *feme-covert* is not; and yet the obligors who are bound may insist with truth that they would not have entered into the contract at all, had they known that the infant or *feme-covert* could escape contribution. Nonage and coverture are facts of which we may be ignorant. The law allows no one to be ignorant of the principle, that a man can not contract with himself. Consequently there is more reason to exonerate a man from his obligation when an infant or *feme-covert* unites with him in its execution, than there is when the obligee performs the idle act of signing as a co-obligor.

The effect of a note executed by a member of a firm, in the name of the firm, to a copartner in his individual capacity for goods or produce, did at first present some difficulty. I do not deem it important now to attempt explaining and

elucidating it, because the present case is manifestly not one of that character, and it will be time enough to dispose of that case when it comes.

Allin being styled executor in the obligation sued on, can not render his signature as an obligor efficacious. That is merely *descriptio personæ*.

In *King v. Green*, 19 Am. Dec. 46, it was held that an administratrix marrying the obligor in a bond payable to herself, in her representative capacity, did not thereby extinguish the debt, but merely suspended the right of action during coverture, and while she continued administratrix.

The principal case has been frequently cited and relied upon in Kentucky upon the point that a person can not be both obligor and obligee in the same instrument, and that an instrument in which a person does appear in both such capacities, is, as to him, a nullity; but that it is effectual as to the other parties thereto, if any: *Morrison v. Stockwells*, 9 Dana, 172; *Cecil v. Laughlin*, 4 B. Mon. 30; *Muhling v. Sattler*, 3 Metc. (Ky.) 285; *Quisenberry v. Artis*, 1 Duv. 30. See, also, *O'Bannon v. Simrall*, 1 B. Mon. 287; *Daniel v. Crooks*, 3 Dana, 64. The general rule of law that the same person can not be both the plaintiff and defendant in the same action, or both obligor and obligee in the same contract, is also recognized and adopted in that state: *Thomas v. Thomas*, 3 Litt. 8; *Suttles v. Whitlock*, 4 Mon. 451; *Gatewood v. Lyle*, 5 Id. 6; *Debard v. Crow*, 7 J. J. Mar. 7, 22 Am. Dec. 113; *Muhling v. Sattler*, 3 Metc. (Ky.) 285; *Cason v. Wallace*, 4 Bush, 388. In *Muhling v. Sattler*, *supra*, which was an action brought upon a promissory note executed by Muhling, payable to himself or order, and by him indorsed to the appellees, it was determined that such an instrument imposed no legal liability upon the maker, and also, that in that state it was not negotiable paper and possessed none of the attributes of paper of that kind. In *Morrison v. Stockwell*, 9 Dana, 172, where the name of a firm was signed to a note by one of two partners, and the note was made payable to the other, it was held that it was merely the note of the former, and that the other partner might recover from him the whole amount thereof. So in *Quisenberry v. Artis*, 1 Duv. 30, a note signed by Q. and D. and made payable to A. and D., was held to be the joint note of Q. and D. to A. In Massachusetts, where a note or bill is given by a firm to one of its members, the promisee can not sue, as that would be to bring an action in part against himself; but if he indorse the paper, the indorsee may sue: *Pitcher v. Barrows*, 17 Pick. 361; *Thayer v. Buffum*, 11 Metc. 398; *Fulton v. Williams*, 11 Cush. 110; *Temple v. Seaver*, Id. 314; *Richards v. Fisher*, 2 Allen, 527; *Ingham v. White*, 4 Id. 412. See *Smith v. Lusher*, 5 Cow. 688, for the rule in New York. In Maine, the same rule prevails as in Massachusetts: *Davis v. Briggs*, 39 Me. 304; Redf. and B. Lead. Cas. on Bills and Notes, 478.

WALLER v. DEMINT.

[1 DANA, 92.]

POSSESSION OF SLAVES BY A PERSON who acknowledges the title of another thereto, and holds under him, is not adverse.

EQUITY WILL NOT SPECIFICALLY ENFORCE an implied agreement to surrender the possession of slaves.

EQUITY HAS NO JURISDICTION TO RELIEVE a person from the bar of the statute of limitations, although it appear that the defendant held certain slaves of the complainant, and that the time to bring an action at law for their recovery had been allowed to elapse by the latter by reason of certain offers of compromise made by the former.

BILL in chancery. Appeal from the circuit court for Gallatin county. The facts are stated in the opinion.

Richardson, for the plaintiff.

No appearance for the defendant.

By Court, **ROBERTSON, C. J.** This is a bill in chancery, filed by William Waller against William Demint, alleging that the latter held slaves, the property of the former, which could not be recovered in an action at law, in consequence of the time which had elapsed since the cause of action had accrued; but that frequently during the period within which a suit at law might have been maintained, Demint had lulled him (Waller) by propositions of compromise, and by expressing the opinion that he (Waller) was entitled to the slaves, and a determination to give them up. The object of the bill is to avoid the statute of limitations, and obtain a decree for the slaves. The circuit court sustained a demurrer to the bill.

If the allegations of the bill be deemed sufficient to show that Demint recognized the title of Waller, and held under it, or surrendered to him his claim, within five years, then, as the adversary possession was thereby extinguished, the statute of limitations would not have been available at law. And if that deduction be unauthorized, the fact that Waller was lulled by delusive hopes or expectations can not give the chancellor power to enjoin Demint from the benefit of the statute of limitations, and to decree the slaves to Waller.

Whether the object of the bill be a specific execution of an implied agreement to surrender the slaves, or a decree for an avoidance of the statute of limitations, the chancellor had not jurisdiction. If, under other circumstances, any relief could be afforded, there should be none in this case, because the bill does not allege that any assurance was given by Demint to Waller, within five years immediately preceding the institution of the suit. This would be a sufficient reason (had there been no other) for sustaining the decree of the circuit court.

Decree affirmed.

BUTLER v. TRIPLETT.

[1 DANA, 152.]

BOND EXECUTED BY THE VENDOR of a tract of land to the vendee, as indemnity to the latter for the loss of the land by a paramount title, is founded upon a sufficient consideration, although the vendee has not been evicted by such paramount title.

MONEY PAID TO THE OBLIGEE in a bond by the obligor, there being no proof that the latter is otherwise indebted to the former, will be presumed to have been paid on account of such bond.

WHERE THE VENDOR OF A TRACT OF LAND covenants with the vendee, that if any of the land is lost, he will convey, of another tract, two acres for every one lost, and a paramount title appears, of which the vendor has notice, and subsequent to which he sells the land out of which the indemnity was to be made, for a price paid per acre, equal to that he received for the first tract sold, he will be accountable to the first vendee for the proceeds of twice as many acres as have been lost, although that amount be double the consideration that the latter paid for it.

COMPLAINANT WHO SHOWS HIMSELF ENTITLED to some relief, although only part of the relief sought, is entitled to recover costs.

BILL in chancery. Appeal from the circuit court of Franklin county. The facts are stated in the opinion.

Morehead and Brown, for the appellant.

Triplett and Monroe, contra.

By Court, ROBERTSON, C. J. In 1822, Butler conveyed to Triplett some real estate in Mountsterling, at the price of four thousand dollars, paid in promissory notes, assigned by Triplett, for two thousand and nine hundred dollars; a tract of land at six hundred dollars, and another tract of one thousand and forty acres at five hundred dollars, both conveyed by Triplett to Butler. In the conveyance of the latter tract Triplett covenanted that, if any portion of the land should be "taken" by a superior claim, he would convey to Butler, out of an adjoining tract, two acres for every acre which should be so taken.

In 1830, Butler having represented to Triplett that an adverse claim of one Thomas, deemed paramount to that of Triplett, covered four hundred and five acres of the one thousand and forty acres, requested a fulfillment of the warranty, without a suit for testing the conflicting titles; and Triplett, having, in the mean time, sold and conveyed to a stranger, the land out of which he had covenanted to indemnify Butler, agreed, in consideration of the premises, to pay him four hundred and five dollars; and accordingly paid him thirty-five dollars, and gave him his bond for three hundred and seventy dollars. To enjoin

a judgment obtained on that note, and rescind the contract for the land, Triplett instituted this suit in chancery. He alleges, in his bill, that he was not responsible to Butler, for more than the original consideration for the four hundred and five acres of land covered by Thomas' claim, which was less than fifty cents an acre; and that, therefore, instead of four hundred and five dollars, he was not bound to pay as much as two hundred dollars; but that the note was executed in haste, and through inadvertence and mistake. He suggests doubts as to the validity of Butler's title to the Mountsterling estate, and avers, that he had paid Butler eighty-seven dollars, for which he asks a decree.

Butler, in his answer, alleges that he had a perfect title to the property which he had conveyed to Triplett, and exhibits documents of title apparently complete. He denies that there was any haste, or mistake, in the execution of the bond for three hundred and seventy dollars; avers that Triplett had sold for fifty cents an acre, the land which he had covenanted to convey to him as an indemnity; and therefore agreed, that as he could not make him a title to the land, he would pay him money in lieu of it, at the rate at which he had sold it; and that, consequently, as eight hundred and ten acres (double the quantity admitted to have been virtually lost), amounted, at fifty cents an acre, to four hundred and five dollars, Triplett agreed to pay him that sum.

Upon the bill and answer, the circuit court perpetuated the injunction to the entire judgment, and decreed to Triplett a restitution of the thirty-five dollars, and the eighty-seven dollars.

As there was no cause for rescinding the original contract, the only ground on which the decree could be maintained, would be that there had been a total want of consideration. But although there had been no actual eviction, there was a valid consideration for the bond; for Triplett might have waived a formal eviction, which would have increased his responsibility; and that he did so, should be inferred from his conduct, and even from his bill. It is too late, therefore, to object, even if he had objected in his bill, that Butler had never been evicted. There is no allegation of fraud, or misrepresentation, or even misconception, as to Thomas' claim, or as to the extent of its interference with Butler's one thousand and forty acres. Consequently, there is no sufficient ground for the decree of the circuit court.

Although Triplett does not state when, or on what consideration, he paid the eighty-seven dollars, yet we are inclined to

the opinion that as there is no proof that he made the payment prior to the execution of his bond, or that he owed Butler on any other account, he should be entitled to a credit for the eighty-seven dollars. But as Butler might have been entitled to the eight hundred and ten acres of land, if Triplett had not sold it, and especially as Triplett parted with the title after he seems to have had notice of the interference of Thomas' claim, it would be difficult to maintain that he was under no obligation, either equitable or moral, to account to Butler for the price which he had received for the eight hundred and ten acres, or for its value at the time of their settlement. What that price or value was can only be inferred from the fact that Triplett's bond may appear to have fixed it at fifty cents an acre, and he does not suggest that it was less. It seems to us, therefore, that having given his bond for that amount, he should not impeach the consideration, unless he could establish fraud or mistake. There is no proof whatever of either, and we do not feel authorized to presume either, under all the circumstances.

There being no proof to the contrary, this court should presume that the parties understood their relative rights and obligations, and accordingly adjusted them, by a fair, amicable, and final compromise, which was a sufficient consideration for the bond.

Wherefore it is ordered by this court that the decree of the circuit court be reversed, and the cause remanded, with instructions to perpetuate the injunction for eighty-seven dollars; and dissolve it for the residue of the amount enjoined. Triplett must pay the costs in this court; but, as he is entitled to some relief, he should have a decree for the costs in the circuit court.

DAVIS v. WHITESIDES.

[1 DANA, 177.]

ACKNOWLEDGMENTS OF AN AGENT made subsequent to the transaction, in which he acted as agent, are not evidence against the principal, because they form no part of the *res gestæ*.

APPEAL from the circuit court of Shelby county. The facts are stated in the opinion.

Monroe, for the plaintiff.

Richardson, for the defendant.

By Court, ROBERTSON, C. J. The circuit court erred in instructing the jury that, if Miller was either the partner or agent of the plaintiff, his (Miller's) statements, as proved by another witness, were competent as evidence against the plaintiff. An acknowledgment of an agent is not admissible as proof against his constituent, unless it formed a part of the *res gestæ*.

If Miller had, as agent, collected the account alleged to be due from the defendant to the plaintiff, anything which he said at the time of collection would have been evidence against the plaintiff; but no acknowledgment after the payment would have been legal proof. As the acknowledgment which was proved in this case was made after the payment or settlement of the account (if it was ever paid or settled), the instruction, as given and as applied to the facts, can not be sustained.

Wherefore, we feel constrained to reverse the judgment, and remand the cause for a new trial.

AGENTS' DECLARATIONS, when evidence against the principal: *Roberts v. Burt*, 12 Am. Dec. 385, and note; *Burlington v. Calais*, 18 Id. 691; *Welsh v. Carter*, 19 Id. 473; *Haven v. Brown*, 22 Id. 208.

WOODARD v. SPILLER.

[1 DANA, 180.]

WHERE TENANTS IN POSSESSION, together with their warrantor, are made defendants in an action of ejectment, there can be no recovery against such tenants, except upon such evidence as would justify a recovery against the warrantor.

DEPOSITIONS TAKEN WITHOUT NOTICE to such warrantor can not be used as evidence against the tenants.

REGISTER OF BIRTHS, in the handwriting of a deceased father, is admissible to prove the ages of the children.

COMPARISON OF HANDWRITING is, in general, not evidence to prove a signature, except where the writing is too old for a living witness to prove it, or in corroboration of other proof.

PERSON IS NOT INCOMPETENT to be a witness in a particular case on the ground of interest, unless his rights will be affected by the determination therein; and the fact that he has an interest like that of the party offering him does not render him incompetent.

A PRETERMITTED CHILD is entitled to the same share of the father's estate that he would have had if there had been no will.

EJECTMENT. Error to the circuit court of Adair county. The facts are stated in the opinion.

Haggin and Brents, for the appellants.

Buckner, for the appellee.

By Court, NICHOLAS, J. This was an action of ejectment, brought by Spiller against Woodward and others in possession for the recovery of a tract of land sold and conveyed by Spiller to Craddock. Woodward and the others, together with Craddock, were, by consent, made defendants in lieu of the casual ejector. A joint trial was had, and verdict and judgment rendered for the plaintiff, from which the defendants prosecute this appeal.

We deem it necessary to notice only a few of the various questions raised by the assignment of errors.

The court permitted depositions to be read as evidence against such of the defendants as had been served with notice, though no notice had been served on Craddock. The court also refused, at the instance of the defendants, to instruct the jury that if they held the land under the claim of Craddock derived through the conveyance of Spiller, the plaintiff could not recover against any of them, unless there was evidence sufficient to authorize a recovery against Craddock.

It does not appear from the bill of exceptions that there was any proof to show that the defendants in possession held under Craddock; and the court was therefore right in refusing to reject the depositions, or give the instruction asked. But as the same question may again occur upon another trial, we will state that if it had appeared that all the defendants in possession held as the tenants of Craddock, or by conveyance from him with covenant of warranty, the depositions should have been rejected, and the instruction given. There could be no doubt of this, if the defendants in possession hold as his tenants, and we apprehend for a parity of reason the same result should take place, if they are vendees looking to him for indemnity in case of eviction upon his covenant of warranty. It is true, their possession would not, strictly speaking, be his possession, but a verdict and judgment against them after he had been made a party to the suit, would be conclusive upon him in a future action on his covenant, to show that the eviction was had by paramount title. Hence he has a direct interest in the issue of the suit as to every defendant, which would require that the proof should be sufficient to authorize a recovery against him, as though he had been in actual possession.

The court permitted to be given in evidence, to prove the age of the plaintiff, a register of the births of his father's children, made out in the handwriting of the father, who had been dead thirty years. It is well settled that such proof is competent.

The defendants offered in evidence a paper purporting to have been signed by the plaintiff, proffering to prove his signature to other writings, and then by comparison to show that this also was signed by him. The court properly refused to permit it to go in evidence upon such proof. In some cases, where the antiquity of the writing renders it impossible for a living witness to prove he ever saw the party write, comparison with documents known to have been in his handwriting has been permitted: 2 Stark. 657. It has also sometimes been admitted in aid and corroboration of other proof. But alone and without other proof, the general rule is not to admit it.

The defendants offered a witness whose testimony was rejected by the court, on the score of interest, because he was in possession of land lying within the bounds claimed by plaintiff. In this the court erred. His interest was in the question of title involved in this suit, not in its issue. His rights could not be affected by its determination either way.

The plaintiff claimed the land in contest as devisee of his father, William Spiller, who, it was proved, had a child still alive, who was born after the date of the will. The court refused to instruct the jury that said child was entitled to the share of the land he would have been entitled to if no will had been made. The will is the same as that mentioned in the case of *Haskins et al. v. Spiller* (decided this term, 1 Dana, 170), and for the reasons there stated, we think this instruction should have been given.

Judgment reversed, with costs, and cause remanded for a new trial, consistent herewith.

See *Homer v. Wallis*, 6 Am. Dec. 189, and *McCorkle v. Binns*, Id. 420, as to when the disputed signature of a party to a written contract may be compared with other writings proved or admitted to be genuine. See note to *Hess v. State*, 22 Id. 776, as to what evidence is admissible to prove the handwriting of a person.

GORE v. STEVENS.

[1 DANA, 201.]

RELATION OF LANDLORD AND TENANT is destroyed by a judgment of eviction against the tenant.

TENANT AGAINST WHOM SUCH JUDGMENT HAS BEEN OBTAINED may, without being actually evicted by *hab. fa.*, purchase any other title for his own benefit.

PERSON CAN NOT CLAIM AN INTEREST under a deed or will, without giving effect to all its provisions as far as possible.

DEVISEE, THE LAND OF WHOM the testator has attempted to devise to another, can not claim the devise to himself without surrendering the title to his land to such other devisee.

A DEVISEE WHO CLAIMS PROPERTY that has been devised to another, by a title adverse to the testator, and who accepts other property devised to him by the same testator, will be considered as having elected to claim under the will and compelled to surrender his adverse claim to such other devisee.

PROPERTY DEVISED OR BEQUEATHED TO A PERSON who is dead when the will is made, or who dies before the testator, does not pass to such person's heirs. If personalty, it goes to the residuary legatee, and if real estate, it descends to the heirs of the testator.

VENDEES OF ONE WHO, UPON TAKING UNDER A WILL, was compelled to relinquish the land which he had sold as his own, but which the testator had devised to others, will not be affected by any partition among the devisees, to which they, the vendees, were not parties.

BILL in chancery. Appeal from the circuit court of Montgomery county. The opinion states the facts.

Wickliffe and Wooley, for the appellant.

Trimble, Hanson, and Chambers, contra.

By Court, UNDERWOOD, J. Stevens and his wife filed their bill to have partition of a thousand acres of land, among the devisees of John Gore, sen., according to the provisions of his will. With the decree of the court, all the parties, except Benjamin Gore, the appellant, seem to be satisfied. He claims more land than the court has decreed to him, under the following facts:

It seems that the testator was the patentee of one thousand acres of land, situated in the county of Montgomery. As early as 1797 the appellant removed from Virginia, where his father, the testator, lived, and where he died, and settled upon a part of the thousand acres. Some time thereafter, John Gore, jun., who had removed from Virginia and settled on the same tract, before his brother Benjamin, caused two hundred acres to be laid off, by metes and bounds, for the appellant, including his settlement. In thus laying off the two hundred acres, John Gore, jun., acted as agent for his father, and under authority from him. In 1810 or 1811, two deeds were prepared in this state, and sent by John Jamerson, to Virginia, for the purpose of having them executed by the patentee, conveying by one of the deeds the two hundred acres laid off for Benjamin Gore, to him; by the other deed two hundred acres of the one thousand to John Gore, jun., which had been laid off by metes and bounds for him. Jamerson, as agent for the two

sons, carried the deeds to Virginia, and they were executed by their father, and delivered to Jamerson, who deposited them with the clerk of Culpeper county court, for the purpose of having their execution proved before him, by the subscribing witnesses, the testator being too infirm at the time to go before the clerk to acknowledge their execution. Jamerson returned to Kentucky before the execution of the deeds was proved, leaving them with the clerk. The testator thereafter addressed a note to the clerk, requesting that the deeds might be sent to him, and it was accordingly done. Upon the day of the publication of his will, the deeds were thrown into the fire and consumed.

The will gives one hundred and twenty-five acres of the thousand to Fanny Gore, and directs that the balance should be equally divided among his other children, all of whom are named in the will, and from which it appears there were six besides Fanny. Patsey Reynolds—named by the testator as a devisee, and one of his daughters, for whom a sixth part of the thousand acres was intended, after deducting the devise of one hundred and twenty-five acres to his daughter Fanny—was dead at the time the will was executed. The court, in the decree, assigned the portion thus devised, to William Reynolds, heir of said Patsey.

In 1804, Warner's lessee recovered a judgment, in an action of ejectment, against Benjamin Gore. Warner claimed under a patent for five hundred acres, elder than that of John Gore, sen. Benjamin Gore confessed the judgment, reserving equity. In 1813, Warner conveyed his five hundred acres to George Horine, who, in 1815, conveyed the same to Benjamin Gore, with the exception of one hundred and twenty acres conveyed to James Bourn, and a parcel to Reuben McDonald. In 1809, James French conveyed to Benjamin Gore two hundred and fifteen acres of land, including his residence. The title which French thus passed to Benjamin Gore is founded on a patent to John Edwards, of older date than that to John Gore, sen. Benjamin Gore insists that he has a right to hold the land covered by the deeds from his father, French, and Horine. But the court disregarded his title thus set up, and permitted him to claim only under the will of his father.

It appeared in proof that Benjamin Gore had received, under the will, slaves and money. There was a devise to him of one hundred acres of land on Salt river, but it does not appear that he ever took possession of it, or in any way used or set up claim

to it. There is testimony conducing to show that the testator had in his life-time conveyed his land on Salt river to his son, John. Two questions arise upon the preceding facts: 1. Is Benjamin Gore estopped or precluded from setting up a title adverse to that of his father? and 2. If he is, does the decree give him as much land as he is entitled to?

There are two grounds upon which it is contended that Benjamin Gore can not set up titles inconsistent with his father's patent: 1. The fact that he entered under his father's title, and held as a tenant or *quasi* tenant under him. 2. The fact that he received benefit from the will, and therefore it is contended he can not now set up a defense inconsistent with the will. It satisfactorily appears that Benjamin Gore entered under the title of his father, and held for some time as his tenant. But by the judgment in ejectment, the relation which he bore as a tenant to his father was destroyed, and thereafter he was at liberty to make terms with the successful claimant, or others holding superior titles. It was not necessary for him to wait until actually evicted by the *habere facias*, before he could be permitted to purchase in the adverse titles.

There is no foundation for imputing fraud to Benjamin Gore on account of the confession of judgment. We, therefore, perceive no reason why he is not entitled to the full benefit of the patents to Warner and Edwards, unless it can be found in the second ground of objection.

It is one of the leading maxims in equity, "that a person shall not claim an interest under an instrument, whether a deed or a will, without giving full effect to that instrument as far as he can." "If the testator gives what is not his property, but which he supposes to be his, and gives to the person whose property it is, an interest by his will, that person will not be permitted to defeat the disposition where it is in his power, and yet take under the will; and the same rule applies, though the testator knew he had no right to dispose of the lands, and yet knowing it, takes upon himself to dispose of them." No principles are better established by authority than the foregoing, which are extracted from 2 Madd. Ch. 48. It results from their application, that if the testator knowingly attempted to devise land, which belonged to his son Benjamin, and in the same will made a provision for his said son, he could not claim the benefit of such provision without surrendering the title to the land in favor of the devisee to whom it may have been given. If Benjamin Gore were proceeding to recover the money which he was

entitled to under the will, there can be no doubt, but the chancellor would compel him to abide by all the provisions of the will before affording him relief. It would be competent to compel him to make his election, whether he will claim under or against the will.

But his counsel contend that he is not asking the chancellor for relief; on the contrary, it is urged that he is acting in defense of his fireside. We think his attitude can make no difference. As complainant or defendant he must equally submit to all the provisions of the will, or renounce its benefits. He has already taken its benefits. Shall he now say, "I ought not to have received them"? We can not tolerate such a defense. The act of receiving the benefits or legacies of the will, is an election to abide by its provisions, if, at the time, he had a knowledge of all his rights. We infer from the proof that the accounts of the estate have been so far settled and adjusted that he knew all the facts necessary to enable him to make his election in such manner as to promote his interest. It may be that he will gain more by submitting to the will and a partition of the land, and taking his share of the slaves and personalty, than he would do were he to renounce all interest in the slaves and personalty, and hold the land to the extent of his claim. Under such circumstances, having accepted his share of the slaves and personal estate, and not having in his answer proposed or offered to return them, he should be compelled to abide by it, as an election, and should not be permitted to change his mind, as subsequent circumstances may unfold different views. "In a case," says Maddock, 2 vol. 55, "where a widow had conflicting interests under her marriage settlement and her husband's will, and she proved the latter, acted under it, and received rents for six years, she was considered as having made an election." The same author, 2 vol. 60, says: "Where a party has made an election, and proceeds, contrary to such election, to recover estates at law, an injunction will be granted to restrain him." The facts show that the requisite essential to an election may be found in the conduct of Benjamin Gore in accepting his share of the personalty: Roper on Legacies, 2 vol. 389. We can not, therefore, suffer him now to set up titles derived from the patents to Edwards and Warner, and the burnt deed, in opposition to the will. The case of *Groves v. Kennon et ux.*, 6 Mon. 632, does not militate against the foregoing view.

It remains to inquire, whether the quantity of land allotted to Benjamin Gore is as much as he was entitled to. *Patsey*

Reynolds was dead before the making of the will. If the devise in her favor be regarded as lapsed, so that it can not pass to her son, then the portion allotted to Benjamin Gore should be increased by adding to his share. There are no words in the will, going to show that the testator had in his mind a son of Patsey Reynolds. How, then, can the son take the devise to the mother, she being dead before the will was executed? He can not do it from any words in the will, and we have no legal authority to substitute him in the place of his mother. It is clear that he can not make a title to any part of the land as heir to his mother, because no estate ever vested in her under the will. These positions are fully sustained by Roper on Legacies, 2 vol. 320. It was erroneous, therefore, on the part of the circuit court, to decree to William Reynolds the share which the will purports to give to his mother. This would be true even if Mrs. Reynolds had been alive when the will was executed, and had died before the testator. In that event, as there is no provision showing who was to take the portion designed for her, it would strictly be a lapsed legacy or devise, and as there is a clause in the will giving all the residue of his estate, real and personal, to certain named devisees, among whom, neither Mrs. Reynolds nor her son is mentioned, such portion might probably pass into the residuum, and go to the residuary devisees, to the exclusion of Mrs. Reynolds' son.

But be that as it may, as Mrs. Reynolds was not living when the will was made, it is a question, whether the devise in her favor can be considered so far in the nature of a lapsed legacy, or devise, as to pass to the residuary devisees; or whether the portion apparently intended by the face of the will for her, should be considered as so much estate not disposed of by the will, which should descend according to the statute of descents.

If it be regarded as a lapsed legacy of personal property, the law as laid down in Roper, and all the books we have examined, will give the portion to the residuary devisees, notwithstanding the probability that the testator would have given it to the heir of his daughter, had he known of her death. The courts, however, can not seize on that probability, and undertake to make a will for him, contrary to the settled rules upon the subject. If it be regarded as estate not embraced by the will; if the testator can be considered as dying intestate in respect to it; then it will pass to his heirs by descent, and William Reynolds, the grandson, will be entitled to a small

share of that which the will purports to give to his mother. In the one case he loses all, in the other gets a trifle.

The residuary legatee of the testator's personal estate, if he be general legatee, will be entitled to "whatever may, by lapse, invalid disposition, or other casualty, fall into the residue, after the date and making of the will:" 2 Roper, 453. If the provision for Mrs. Reynolds had been a bequest of money, there could be no doubt, under the authority of the adjudged English cases, that the residuary devisees would take it, instead of the next of kin, or the executor. As, however, it is a devise of land, will that alter the rule? The authorities say it does. A residuary bequest of personal estate, according to 2 Madd. 93, carries not only everything not disposed of, but everything that is ill-disposed of, and everything that in the event turns out not to be disposed of, whether by a partial revocation of the will, a lapse, or by a gift being void, or not sufficiently disposed of, or given on a contingency which does not happen, or otherwise." But in this broad rule in favor of the residuary legatee, Maddock has inserted, by parentheses, that the rule is otherwise as to real estate. To show that the rule is otherwise in respect to land, he cites Amb. 580, and 1 Ves. 322. Lord Camden's opinion, as given in 2 Roper on Legacies, 458, takes the distinction between the personal and real estate, and admits the rule in the one case to be, that the residuary general legatee will take lapsed legacies and everything which does not pass by the will, with the exception of real estate. The reason for the difference may be found in the desire of the courts to prevent the residuum from going to the executor in the one class of cases, and to benefit the heir at law in the other. We shall adhere to the distinction, and regard the portion of land which would have passed, under the will, to Mrs. Reynolds, had she survived the testator, as so much estate of which he died intestate. Benjamin Gore should have his share of this land; and William Reynolds, instead of the whole of it, as representing his mother, is entitled to a seventh part only, as an heir of his grandfather.

Ringo, etc., who may have purchased from Benjamin Gore, or any other of the devisees, can not be affected by any partition made among the devisees and heirs, to which they are not parties. Nor will such partition hereafter prevent them from asserting such rights as they have when molested. It is very possible that the vendees of Benjamin Gore may occupy a more favorable attitude than he does; but of this we can only

conjecture until they are properly made parties, and the nature of their claims fully presented. We can not now say that the claims of such vendees will have a material bearing upon the division which may be made between the devisees and heirs, or that their rights will be materially affected by the sales which Benjamin Gore has heretofore made. If the land allotted to him covers all that he has sold, such allotment will inure to the benefit of his vendees.

The decree is reversed, with costs, and the cause remanded, for proceedings not inconsistent herewith.

COGHILL v. HORD.

[1 DANA, 350.]

AWARD MUST BE FINAL, CERTAIN, and conclusive.

AWARD THAT A PARTY SHALL HAVE LAND SECURED TO HIM, or have its value in money, at his election, is not certain and final, unless the time in which to elect is limited, and the value of the land in money ascertained.

AWARD THAT LEAVES ANYTHING FOR FUTURE ADJUSTMENT, otherwise than by computation or measurement, can not be sustained.

ARBITRATION. Appeal from the circuit court of **Mason** county. The facts are stated in the opinion of the court.

Beatty and Haggin, for the plaintiffs.

Hord, for the defendant.

By Court, **NICHOLAS, J.** There being a controversy between the parties to this suit, about the proprietorship of a tract of land, and other matters pertaining thereto, they agreed to submit the same to arbitration, and, with that view, united in a petition to the circuit court, which made the reference accordingly.

The arbitrators returned an award, in substance, as follows: That partition be made between the parties, in which the Coghills were to have two thirds of the whole tract secured, agreeably to its intrinsic value, subject to a deduction of sixty-six acres and two thirds; and that the residue be allotted to Hord. In making partition, the share of Hord to be so laid off as to cover the parcels of land which he has sold, etc., unless his sales shall exceed his quantity. If his sales shall exceed his quantity, then it shall be submitted to the Coghills to elect on which of the parcels sold by Hord their share shall lie, so far as may be necessary to give them their quantity. Or if

the Coghills shall prefer to take money instead of land, so far as their share may fall on parcels sold by Hord, then the award that Hord shall pay the value of such parcels. We also award that each party shall pay their own costs.

Various exceptions were taken by Hord, both to the sufficiency of the original submission, and of the award, and also to the proceedings of the arbitrators. The circuit court having quashed and set aside the award, the Coghills have brought the case here for revision.

In assigning our reasons for affirming the decision of the circuit court, we shall notice only one of the various exceptions taken by Hord. It is that which assails the award on the ground that it is not final, certain, and conclusive. This exception is well taken. Waiving all objection to that part of the award which says the Coghills shall have two thirds of the tract secured to them, without saying how it is to be secured, whether by simple release or conveyance from Hord, or by procuring reconveyances and possession from those to whom he had sold, we think the award defective in not having prescribed a time within which the Coghills should make the election allowed them; or at least in not ascertaining the value in money which they are allowed to take in lieu of the land conveyed by Hord.

This case is wholly unlike those we have been referred to in support of the award. We know of no case which sanctions an award as final that leaves for future adjustment anything that does not lie either in computation or admeasurement. None goes so far, nor would we feel inclined to follow any such, if such there be, as sanctions the leaving to future adjustment, a matter so wholly uncertain as that of the value of property, ascertainable merely by the opinions of witnesses.

The order quashing the award must be affirmed, with costs.

UNCERTAINTY IS FATAL TO AN AWARD.—*Walah v. Gilmer*, 6 Am. Dec. 502.

MILLION v. RILEY.

[1 DANA, 359.]

LIEN OF AN EXECUTION ATTACHES to the defendant's property immediately upon the writs coming into the hands of the sheriff.

SALE OF PROPERTY LEVIED on under execution relates to the time when the lien of the writ attached, and conveys the title held by the defendant on that date.

LAND WHICH THE DEFENDANT in execution has contracted to convey is not exempt from the lien of the writ.

NOTICE OF AN EQUITY does not affect the rights of a party in a trial at law.

GRANTS OF INCORPOREAL HEREDITAMENTS are presumed after a lapse of twenty years.

GRANT OF A FEE-SIMPLE ESTATE is never presumed from mere length of possession, without other circumstances to aid the presumption, unless such possession has continued for thirty years.

PERSON WHO ENTERS INTO THE POSSESSION of land under an agreement to purchase is estopped to deny his vendor's title; but where the land is claimed by a purchaser at an execution sale against the vendor, the vendee in the contract to purchase is not estopped from showing that the title of his vendor was merely equitable, and not subject to sale on execution.

INSTRUCTIONS OF AN INFERIOR COURT will, on appeal, be considered with reference to the evidence before that court when they were given, and if they can be sustained so far as there was evidence to which they were applicable, the judgment will not be reversed, although such instructions taken literally may be erroneous.

DEFENDANT IN EJECTMENT IN POSSESSION of a tract of land under a contract to purchase, and whose vendor's title has been sold under execution to the plaintiff, will not be permitted to set up an outstanding title paramount to that of his vendor's, for the purpose of defeating the plaintiff's action.

EJECTMENT. From the circuit court for Madison county. The opinion states the facts.

Owsley and Caperton, for the appellant.

Turner, for the appellees.

By Court, **NICHOLAS, J.** This is an appeal by Million, from a verdict and judgment in ejectment rendered against him, in favor of the appellees, in 1832.

On the trial it was proved by the plaintiffs, that about forty years before, Isaac Burgen took possession of, and improved the land in contest. After his death, the possession was continued by his four children and heirs, till between twenty-five and thirty years before the trial, when Charles Burgen took possession, claiming it as his own, under the heirs of Isaac Burgen, and that he held it until 1823, when Million took the possession, under an executory contract of purchase from Charles Burgen; and had retained it ever since. On the sixteenth of June, 1826, several executions, in the names of different persons, against Charles Burgen, were placed in the hands of the sheriff, which he levied on the land in contest, on the fifth of August, 1826, and thereafter sold and conveyed it to Riley, the lessor of the plaintiff, as the property of Burgen.

The defendant then gave in evidence a patent for the land to Henry Fields, and a bond from Burgen to Million therefor, executed in 1823. He also produced, and offered in evidence, a deed for the land to him, from Charles Burgen, executed on the twenty-second July, 1826, avowing his object to be: 1. To show that, in compliance with the bond, the legal title had been transferred to him before the levy or sale under the executions, and that, therefore, nothing passed by the sheriff's sale and deed to Riley. 2. To show, by other evidence, that before the executions emanated, Riley had notice of Million's purchase, and that he had paid for the land. 3. To show that, at the time of the sheriff's sale, he was in the adverse possession of the land, claiming it under the deed; and for the further purpose of showing the extent of his possession. The court refused to permit the deed to be read, and, as we think, properly.

The executions having come to the sheriff's hands before the conveyance from Burgen to Million, they thereby obtained a prior lien, which necessarily caused the subsequent sale and conveyance to Riley, to overreach and avoid, by relation, the conveyance to Million. Such has been the uniform effect given to subsequent levies and sales under executions, when they came to the hands of the officer prior to the alienation of the defendant. This is most obviously indispensable, in order to effectuate the lien in favor of the execution secured by statute, from the time it reaches the officer's hands.

This case, however, is attempted to be distinguished from the ordinary one, inasmuch as the defendant, by his conveyance, was merely effectuating a prior sale, made long before, and which he was legally and morally bound and compellable to do. This might have constituted a reason with the legislature for allowing the distinction contended for; but as this has not been done, we can not take upon ourselves to create it, in the absence of all expressions in the statute to authorize any such restriction of the lien allowed to executions. Neither could it avail the defendants anything, to prove, in this action at law, that Riley had notice of his purchase. If it places him in such an attitude as will induce the chancellor to make him surrender the legal title to the defendant, still for the purposes of this suit, it does not divest the title, nor did it obstruct him from obtaining it, through the sheriff's sale and conveyance.

Whatever was the character of the possession held by Million at the time of the levy and sale, can have nothing to do with their validity. At the time the lien attached, the possession

was amicable, and it is to that time that the sale has relation. Its validity must be tested by matters as they then stood. We can not perceive any purpose of substantial benefit to the defendant in using the deed to prove the extent of his possession. It did not conduce to show that he was not in possession of any part of the land sued for. It is further contended that the deed was admissible for the purpose of placing the defendant in the attitude of a purchaser, and enabling him as such to contest the validity of the sale to Riley on the ground of fraud on the part of the creditors, in having their executions levied on this property, which it is insisted the jury might have inferred. But we see no room for any such inference. There was no proof to authorize it. A deed from Field, the patentee, to Isaac Burgen, and another from three of the four heirs of the latter to Charles Burgen, for the land in contest, was read in evidence; and it was proved that the four heirs of Isaac Burgen are still living, and that they were all of age twenty years before the trial.

Upon this proof the court instructed the jury, in effect, that if Million acquired the possession under an executory contract of purchase from Charles Burgen, he was estopped from denying that the title was in Burgen, and that the proof, if believed, showed a right to recover. It refused to instruct the jury at the instance of defendant, that under the proof they should find for the plaintiff only three undivided fourth parts of the land.

The circuit court has been justified in argument for the giving and refusing these instructions, mainly on two grounds, viz.: The right of the jury to presume a conveyance from that heir of Isaac Burgen from whom no conveyance was produced, and the estoppel upon Million to deny Charles Burgen's title.

We do not concur with the counsel entirely in these views. There was no contract of purchase proved between Charles Burgen and the heirs of Isaac Burgen, other than that evidenced by the deed executed by three of them, in 1816. Nor is there any other circumstance in proof, from which the jury might infer a conveyance from the other heir, upon a possession of twenty years. Grants are presumed after twenty years' possession, as we are told by the books; but they are a species of conveyance technically applicable to incorporeal hereditaments alone; and the books are so to be understood when treating on this subject. These presumptions in favor of incorporeal hereditaments. are created by the courts, in analogy to, and in

aid of the statute of limitations, bringing within its operation a large class of cases not embraced by its letter, and which otherwise would not receive the benefit of its protection. But if a conveyance of the entire fee simple, from the true owner of real estate, can ever be presumed from mere length of possession, without other circumstances to aid the presumption, it can not be in less than thirty years. To presume a deed in less time would manifestly confound all distinction between the different periods allowed for making entry, and bringing a writ of right. Peaceable enjoyment of real estate for twenty years, claiming it as one's own, is no doubt *prima facie* evidence of absolute and rightful ownership. But like all such evidence, it remains good only until the contrary is shown. It is very different in its effect from the presumption of a conveyance from the true owner, which is measureably susceptible of disproof.

If the instruction had been as counsel seem to treat it, and as the court probably intended, that as Million entered under an executory contract with Burgen, he was estopped to deny Burgen's title, it could not have been caviled with. But the instruction is, that Million was estopped from denying that the title was in Burgen, which differs materially from the other. Burgen himself, if he had been in the actual possession, would not have been estopped from showing that he had not a legal or even vendible title to the whole or any part of the land. Neither, therefore, can another holding under him, as Million did, be estopped. It would have been perfectly competent for either of them to have shown that Burgen held the whole, or any part, by executory contract merely.

But as there was no such proof made, we do not think the case should be reversed for such verbal inaccuracy in the frame of the instruction. It must be understood, as not inhibiting the making of proof, but the improper use of the proof made. The bill of exception states that it was proved "that Charles Burgen came into possession under Isaac Burgen's heirs, and continued in possession of the land, claiming it as his own, until 1823." This is the whole statement of the proof as to the manner of his holding. There is nothing in it, which indicates that he looked to Burgen's heirs for the title. The statement is, that he held it, claiming it as his own.

Though a defendant in an execution is not estopped to show the nature of his title, in order to manifest that it is a mere equitable one, or otherwise not vendible under execution, yet

we deem him estopped from showing a superior outstanding title in another, merely for the purpose of defeating the recovery of the purchaser under an execution, without manifesting any connection between him and such title. It is not necessary that the purchaser should have the superior legal title, to enable him to recover from the defendant in the execution. It is enough that the title of the defendant, such as it was, good or bad, was vendible, and that the purchaser has acquired it. A contrary doctrine would subject purchasers, oftentimes, to infinite trouble and inconvenience. To deduce title from the patentee, by regular legal proof, is generally accompanied with much difficulty; and it may well happen, that the knowledge of the mode of doing it is locked up in the defendant's own breast. On the other hand we can perceive no injury, inconvenience, or injustice, that can ensue to the defendants, from the rule here prescribed. He has, or is justly presumed to have, full knowledge of his own title, and its mode of derivation. If it is a mere equitable one, or one which, from any cause, is not subject to execution, he ought to be able to show it, and will not be estopped from so doing. The burden of the proof properly rests on him.

Taking the instruction, therefore, as speaking in reference to the case as it then stood before the jury, it meant nothing more than that the defendant was estopped from relying upon the superior title shown to be in one of the heirs of Burgen, to defeat the plaintiff's recovery, to the extent of an undivided fourth of the land. With this understanding, we do not think the instruction given is liable to just exception, or that the court should have given that asked by the defendant.

The judgment must be affirmed.

EXECUTION BOUND THE DEFENDANT'S GOODS at common law from its tests: *Green v. Johnson*, 11 Am. Dec. 763, and note; *Jones v. Jones*, 18 Id. 327; *Hanson v. Barnes' Lessee*, 22 Id. 322. The lien of an execution binds the goods from the delivery of the writ to the sheriff, and takes precedence of subsequent transfers: *Beals v. Guernsey*, 5 Id. 348; *Haggerty v. Wilber*, 8 Id. 321; *Cresson v. Stout*, Id. 373; *Beals v. Allen*, 9 Id. 221; *Jones v. Jones*, 18 Id. 327.

NOTICE SUFFICIENT to put one on inquiry: *Lodge v. Simonton*, 23 Id. 48, note.

TAYLOR v. PORTER.

[1 DANA, 421.]

NO PRINCIPLE OF LAW allows one man to substitute himself as the vendor in a contract for the sale of land, in place of another, against the will of the vendee.

VENDOR IN A CONTRACT FOR THE SALE of a tract of land, or his legal representatives as such, can alone make such title as the vendee will be compelled to accept, and the administrator of such vendor who holds in his own right the title to the land agreed to be conveyed, can not compel the vendee to accept the title under his contract with the deceased.

VENDEE WHO HAS, WITHOUT SUCCESS, MADE EVERY REASONABLE EFFORT to obtain the title contracted to be conveyed to him, and who has abandoned the possession and filed his bill for a rescission, can not then be compelled to accept the title.

COURTS OF EQUITY, IN THE RESCISSION OF CONTRACTS, seek as near as possible to place the parties in *status quo*.

VENDEE IN POSSESSION OF LAND, under a contract of purchase, is not chargeable with rents, nor entitled to interest on the money paid, as long as the parties abide by the contract.

UPON THE DISAFFIRMANCE OF SUCH A CONTRACT, the vendee is chargeable with rents until he surrenders possession, and is entitled to interest until his money is refunded.

WHERE THERE HAS BEEN A PARTIAL PAYMENT by the vendee in such a contract, upon it being disaffirmed, there should be an equitable adjustment of rent and interest.

VENDEE IN A CONTRACT OF PURCHASE is not compelled to go out of the state to notify the vendor that he renounces the contract; he may abandon the possession without notice.

UPON THE RESCISSION OF A CONTRACT for the sale of land for failure of the vendor to make the vendee a title as agreed, the former must take back the property without compensation for casual destruction, decay, or dilapidation of buildings, or other improvements not caused by any negligent act or omission of the vendee; but the latter is liable if he has sold and removed or wantonly injured or destroyed such improvements.

BILL in chancery for a rescission. Appeal from the circuit court of Campbell county. The facts are detailed at length in the opinion.

Morehead and Brown, for the appellant.

Marshall and Julian, contra.

By Court, **UNDERWOOD, J.** In 1810, James McGinnis executed his bond to Porter, for the conveyance of lots Nos. 89 and 90, in the town of Newport, "including the tan yard, dwelling-house, currying shop, and bark house, with all other improvements thereon, so soon as he should pay half the purchase money, to wit, four hundred and fifty dollars." In 1826, Porter filed his

bill, charging, in substance, that McGinnis had only an equitable title to one of the lots, and that he had no title whatever to the other; that McGinnis was dead; that Taylor had administered, and as administrator, had obtained judgments on the two last notes executed for a part of the purchase money; that he, Porter, had paid more than the half of the purchase money, and that he could obtain no title. Wherefore, he prayed for an injunction, dissolution of the contract, etc.

The circuit court perpetuated the injunction, rescinded the contract, and decreed the payment of five hundred and fifty-three dollars to the complainant Porter, that being the amount of the purchase money paid by him, subject to a deduction of three hundred dollars, as rent for the use of the premises, while they were in the possession of Porter, who had abandoned the property, after using it about six years. From the above decree, Taylor prosecutes an appeal, and now insists that it was erroneous to rescind the contract; but, if that be right, then the circuit court erred in not compelling the appellee to account for waste, and the dilapidation of the improvements, as well as rent, and that the sum allowed for rent is less than it should have been.

The contract was correctly rescinded by the circuit court. McGinnis was unable to make a title according to his contract. This seems to be admitted by Taylor; but he claims the right of controlling the lots in Newport, and disposing of them under authority derived from the original proprietor of the town, and an effort is made by him to compel Porter to accept the title through him, and to pay the purchase money. The principle is unknown to this court, which will allow one man to substitute himself as the vendor, in place of another, against the will of the vendee. The fact that Taylor has administered on the goods and chattels of McGinnis, can not give him the right to substitute himself for McGinnis in the fulfillment of his contracts for land, by conveying the title directly to Porter. The appellee is not bound to accept the title from any one except his vendor, or his representatives, acting in their representative character. The insolvency of McGinnis, in this case, can not change the rule. Taylor's warranty may be better than that of the representatives of McGinnis, but Porter is not bound to accept it, because he made no contract with Taylor.

It is useless to inquire whether the title to the lots is vested in the trustees of Newport, or to determine in whom it abides. It is sufficient that McGinnis had no title, and that his repre-

representatives, as such, have proved no title, in order to comply specifically with the contract. It is too late now to require Porter to accept a title if it were entirely unexceptionable. The questions raised relative to rent, waste, and deterioration of the property by its use and abandonment, are more important. It seems that Porter abandoned the property after using it about six years. Before abandoning the property he had made one or more ineffectual efforts to obtain the title from McGinnis, who had removed from the state. Failing to obtain the title, he abandoned the property without giving any notice of the abandonment to McGinnis, then a non-resident.

It is not clear, in what state of repair the improvements were left. In 1827, according to the proof, the improvements had gone to destruction. The dwelling-house had not been in tenantable order for the preceding seven years. It may be inferred from the evidence, that the lots in their unimproved condition were not worth more than a sixth part of the sum Porter agreed to give for them. The improvements, the tannery, constituted much the greater part of the value of the property. Upon these facts, the questions arise, whether Porter shall be compelled to pay rent, and if so, for what period of time; and whether he shall be compelled to account for the deterioration of the improvements.

The great principle which governs the chancellor in rescinding contracts, is to place the parties, if practicable, in *statu quo*. If that can not be done, then he should come as near to it as possible, the nature and stipulations of the contract considered. If, in this case, Porter had paid all the purchase money as it became due, and then asked for a rescission of the contract because he could not obtain a title, equity would require of McGinnis to repay the purchase money, and of Porter to restore the property. But so long as Porter held and used the property which he contracted for, he would have no right to demand interest on the money he had paid for it. Nor would McGinnis under such circumstances have a right to demand rent. This should be the rule so long as the parties continued to affirm the contract, upon a disaffirmance by the vendee; if he continues in possession thereafter, he should account for rents, and is entitled to interest. The present, however, is not a case coming precisely within the operation of the foregoing rules.

Porter never paid the whole of the purchase money. McGinnis did not, therefore, obtain the full equivalent for the property, according to the terms of the contract; consequently could not

have been indemnified for the use of the entire property, by the use of a part of the purchase money. While Porter enjoyed all he contracted for, McGinnis only enjoyed a part of the consideration he was to have, under the contract. This inequality should be made up. We deem it unnecessary, however, to go into a consideration of the principles applicable to this case, in order to fix the rule which should govern in ascertaining the extent of Porter's liability for rent, because it is very clear that he has been charged as much as could be allowed under any rule we might adopt.

We are of opinion that the circuit court correctly refused to charge Porter with rent after he had abandoned the property. At that time, McGinnis was a non-resident, and it was not the duty of Porter to go out of the state in pursuit of McGinnis, in order to notify him that the contract was renounced, especially as it was the duty of McGinnis to make the title upon the payment of half the purchase money, wherein McGinnis was delinquent.

Upon the subject of waste, it is sufficient to remark that there is no evidence which shows that Porter committed any. The deterioration of the property seems to have been the result of ordinary use and natural decay. It does not appear that Porter made any repairs, nor is it shown what sum would have been sufficient to keep the premises in repair. Upon this branch of the case, the question is, shall Porter be compelled to restore the property in as good condition as it was when he received it? If he does not, shall he account for the deterioration?

The vendor is in every case bound, upon the rescission of the contract, to return the whole of the purchase money. If he be robbed and lose it all the hour after receiving it, or be deprived of it by any casualty whatever, still he is bound to restore the whole. If that be the case, does not reciprocity hold the vendee liable for the restoration of the property in as good a condition as it was in when he received possession? It might be regarded as a hard case on the part of the vendor, who was compelled to return a thousand or ten thousand dollars, which he had received for a lot and the improvements on it, and to take back the lot without its improvements, when they constituted nine tenths of the value of the property at the date of the sale. Suppose the improvements are destroyed by fire, is the vendee bound to rebuild, or to deduct the value of the improvements from the purchase money, when the contract is rescinded? We think the vendee is not bound to rebuild, or to account for

the value of improvements destroyed by casualty. Notwithstanding such destruction, he is bound to accept a title, provided the vendor complies with his contract, or tenders a performance in due time. It would be difficult to show that the vendor's failure to comply with the contract could, in sound morals, give him an equitable claim to the value of the improvements which were destroyed in their use or by casualty, when the loss would fall upon the vendee, provided the vendor performed the contract, or could insist upon a specific execution before the chancellor. To allow the vendor to recover for improvements thus destroyed, after he was in default to such an extent as justified the rescission of the contract, would be to reward his wrong. Inasmuch, therefore, as the vendee is compelled to put up with the loss, where the vendor has a right to sell the property and observes the contract on his part, he ought not to abide by or sustain the loss, where the contract is not rescinded for any fault of his, but for the failure or inability of the vendor to perform it.

The vendee in possession is the *quasi* tenant of the vendor where the contract is executory. But still the vendee holds so far in his own right as to incur no legal obligation to make repairs, or to warrant or insure against casualties. How can it be told that the same kind of casualty, or one more destructive, might not have happened, if the vendor had continued in possession and not made the sale? Would he keep the property in any better repair than his vendee? If casualties happened while he was possessed and the owner, or if he failed to repair and the property went to destruction, the loss would be his. There is no certainty that the property would be safer remaining in the hands of the vendor, than in the possession of the vendee; and therefore, unless the injury can be traced to some culpable act or omission of the vendee, producing the loss in the value of the improvements, we perceive no ground on which to charge him. If he set fire to them, and consumed them, or if he removed and sold them, in these and similar cases, as the deterioration would result from his voluntary act, he should be held responsible, on the rescission of the contract, for the value of the property he had thus destroyed or used. But when, without his fault, a loss happens, it should fall on the vendor who has been faithless to his contract.

The restoration of the purchase money, in the same number of dollars and cents, may be far from doing exact justice to the vendee, because the rise of property in price, between the date

THE PENDENCY OF AN ATTACHMENT SUIT WITHOUT THE JURISDICTION, is reason that judgment upon the same cause of action here should be conditional, so that its execution may be stayed, unless the plaintiff dismiss the attachment suit, or if he elect to proceed in that suit, so that only the balance due on the judgment, after the sale of the attachment property, may be collected here.

THE opinion states the case.

By Court, PORTER, J. This suit is brought to recover from the defendant a debt due to the insolvent, previous to his failure, and an attachment was levied on property of the defendant, found within the jurisdiction of the court.

There were two trials in the court below, and on both the decision was in favor of the plaintiff. The proceedings in the court below, and the causes which induced the judge to order a new trial, need not be set out, as the case turns on matters which are not affected by them. The existence of the debt appears to be sufficiently proved. The principal question in the cause, relates to the effect which an attachment should have, that was levied by the plaintiff on goods of the defendant in the state of Kentucky, and which attachment was in force at the time this suit was instituted.

The defendant has pleaded the suit in Kentucky, on which the attachment issued in abatement of the present action; and he has further pleaded, that the plaintiff had, previous to the institution of this suit, funds belonging to the defendant to an amount sufficient to satisfy the claim of the petitioner.

On the first point, we think, the pendency of a suit for the same cause of action, in another state, can not abate a suit in our courts; and the principles on which this doctrine has been established, and so generally recognized, are not at all affected by the process which the plaintiff may resort to in another country to enforce or assure his rights. We can not distinguish between the effect of a suit in which attachment issued, and one where the defendant was arrested and held to bail.

But though that attachment can not deprive the plaintiff of the aid of our courts to enforce his rights, we are of opinion, for reasons which will be given hereafter, that it may have effect in modifying the relief to which he is entitled here; and it therefore becomes necessary to examine the exceptions taken to the evidence by which the defendant attempted to establish the pendency of the suit in Kentucky.

The defendant produced in evidence two records sewed together. One of the suit of the present plaintiffs against the

trators, and every of them," etc. It was held a joint, not a joint and several, obligation: Whart. Dig. 90.

And there are a great many cases in the books which clearly proceed on the idea that such words create a joint obligation, because they turn on the effect of other words being added to them, which make the engagement one *in solido*. A number of them are collected in Bac. Abr., vol. 5, 164-166.

But be the authorities in that system of jurisprudence what they may, we are of opinion that under the provisions of our code the words "we promise to pay" do not express an obligation that each one of the parties signing shall pay the sum which is promised by all.

We do not think there is any weight in the objection that the obligation, in this instance having been given to secure the payment of a debt due by others, must be subject to the law which governs sureties. The proof adduced shows that the parties signing it were not bound for the principal debt. The engagement was independent of it, and received as collateral security.

It was contended that the defect of not joining all the debtors in the suit should have been pleaded by way of exception, and that it was the duty of the defendants at the same time to show that those who were not sued were amenable to the jurisdiction of this court.

Admitting the regular practice to be that this matter should be pleaded in *limine litis*, we do not see how the plaintiffs could be benefited by the recognition of the rule. All the obligors were made parties in the first instance to the suit. The plaintiffs, after issue joined, discontinued as to some, and by doing so left the defendants no remedy but to take advantage of it at the trial. As the general rule is that all must be sued, and the exception, if it be one, is that the co-debtors can not be brought before the court, we think it is sufficient for the defendants to show that all are not made parties, and that it is the duty of the plaintiffs to establish the facts which make their case an exception.

It is therefore ordered, adjudged, and decreed that the judgment of the circuit court be affirmed, with costs.

That the tendency of the law is rather to consider an obligation as joint than as joint and several, see *Carter v. Carter*, 2 Am. Dec. 113, and also same case as to what words will create an obligation joint and several.

ARMISTED v. BOWDEN.

[5 LOUISIANA, 263.]

THE RIGHTS OF CREDITORS UNDER AN ATTACHMENT ON SLAVES will not be affected by a prior conveyance of the slaves, executed without the state, and which has not been recorded here, nor under which has there been possession taken.

THE facts appear from the opinion.

McCaleb and Gray, for the appellants.

Peirce, contra.

By Court, PORTER, J. This action was commenced by attachment, and the case comes before us on an appeal by the intervenors, who set up title to the property attached in the hands of the garnishee.

The appellants claim under a sale made in the state of Virginia. The slaves were not delivered when the attachment was laid, nor was any registry ever made in this state of the conveyance by which they were acquired. The plaintiff, who was a third party to the act, can not be affected by it until it was duly recorded here. The slaves were within this state when the contract abroad took place; and it is clear that the conveyance made there can not have greater effect than a similar one executed within the limits of Louisiana which was unregistered could have: 2 La. 122.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs.

CONFLICT OF LAWS REGARDING TRANSFERS.—Generally, the validity of a contract must be determined according to the laws of the country where it is made; but transfers of property form an exception to this rule. The transfer must be valid under the laws of the state or nation in which the property is situate; and this is especially true when the transfer is assailed by the creditors of the vendor residing in the state where the property is situate: *Miles v. Oden*, 19 Am. Dec. 177; *Saul v. His Creditors*, 16 Id. 212, and note; *Ramsey v. Stevenson*, 12 Id. 468, and note.

VERSAILLES v. HALL.

[5 LOUISIANA, 281.]

THE CONTRACT OF INDENTURE IS NOT ASSIGNABLE so as to pass a right to the assignee to the services of the apprentice.

THE facts appear from the opinion.

By Court, PORTER, J. This case presents distinct questions

in relation to the two minors. Pierre Avariste, who was originally bound to Hall and Adams, agreed, with the consent of his mother and the approbation of the mayor, that the indenture should be transferred to the defendant. As the original indenture thus transferred was made previous to the promulgation of the Louisiana code, the case falls within the law as settled in 10 Martin, 358, and the right to annul the indenture must be denied. The question whether the master, under the provisions of the Louisiana code, can correct the indented servant with a whip, need not be decided in this case.

John Baptiste's indentures, however, have not been transferred with the approbation of the mayor, and the defendant's right to his services depends on the validity of the transfer made to him by his partner Adams. The contract of indenture appears to us to be personal and not susceptible of alienation. The character, temper, etc., of the master enter much into the considerations on which such an agreement is made, and he has not a right to substitute another in its place without the consent of the minor, or his legal representatives. Chancellor Kent says it is yet not definitely settled whether an indented apprentice can be assigned from one master to another, though he cites cases which go far to show that it is considered he can not. Lord Mansfield said in the case of *The King v. Stockland*,¹ that though an apprentice is not assignable, yet if he continue to serve the new master he might gain a settlement under the poor laws. In the case of *Baxter v. Benfield*,² it was decided that a contract of apprenticeship ceased with the life of the master, and did not pass to the executor. We apprehend it would be the same thing in case of insolvency. The interest in the services of the individual indented would not pass to the syndics. Nothing positive can be found in our laws on the subject. It would seem difficult to assimilate free children to property which passes by a transfer in writing, or by delivery, or that they have no higher protection against a transfer to a bad master than a slave: 2 Kent Com., ed. 1832, 265; Doug. 70; 2 Strange, 1266.

It is therefore ordered, adjudged, and decreed that the judgment of the parish court, so far as it relates to the apprentice John Baptiste, be affirmed, and that the judgment of said court in relation to Pierre Evariste be reversed, and that as to him, there be judgment in favor of the defendant. The costs to be paid in equal proportions by the plaintiff and defendant.

1. Doug. 70.2. *Baxter v. Benfield*, 2 Stra. 1266.

ASSIGNMENTS OF CONTRACTS OF APPRENTICESHIP.—The law upon this subject is thus stated in Reeve, in his work upon Domestic Relations: "The right which the master acquires to the service of his apprentice can never be assigned to another person. It is incompatible with the nature of the contract, which is altogether fiduciary. The master is one in whom the parent of the apprentice has such confidence as induces him to place under his care his child. It is a personal trust which can not, in any case, be assigned to another. By the custom of London, apprentices may be assigned. It is also a usual practice in this country; but I have not learnt that such practice has been sanctioned by the decision of any court: 1 Bl. Com. 420; 12 Mod. 553; 3 Keb. 519; Doug. 70; Stra. 1267." Reeve on Domestic Relations, 344, 345. See, also, *Haley v. Taylor*, 3 Dana, 221; *Nickerson v. Howard*, 19 Johns. 113. But though such assignment could pass no interest in the apprentice, yet if the apprentice should refuse to serve under the assignment, then this latter will be considered in the light of a contract between the two masters that the child should serve the assignee, and the assignor would be liable upon his covenant: *King v. Stockland*, Doug. 70; 1 Ld. Raym. 683; *Haley v. Taylor*, 3 Dana, 221; *Nickerson v. Howard*, 19 Johns. 113.

HENSHAW ET AL. v. ROLLINS.

[5 LOUISIANA, 335.]

ONE FURNISHING NECESSARY SUPPLIES TO A VESSEL has a remedy to enforce payment therefor, against either vessel, owners, charterers, or master.

IDEM—NOVATION.—That such person has charged such supplies to the charterer will not *per se* act as a novation and release the other parties.

The facts appear from the opinion.

Grymes, for the appellant.

Slidell, *contra*.

MARTIN, J. The defendant is appellant from a judgment by which the plaintiff recovered from him, as master of the brig *Sarah*, the amount of disbursement made at his request by them for the brig, on the account, not of her owner, but of persons who had chartered her.

The counsel for the plaintiff has held, that by the grand principles of mercantile law, the master is liable for the disbursements of the vessel, unless relieved from the responsibility by the express terms of the contract: Holt on Shipping, 319, Abb. N. S. 135; Livermore on Agency, 267; Paley, 305. He has contended, the special engagements of the master appear, many of the bills having been paid by his written order. That the defendant can not avail himself of a plea of novation, as this mode of extinguishing a debt can not be presumed, and must be express and unequivocal: Civil Code, 2186; *Hobson et*

al. v. Davidson's Syndic, 8 Mart. 430 [13 Am. Dec. 294]; *Gordon v. Macarty*, 9 Id. 268; *Bacon v. Stone*, 2 N. S. 144;¹ *Mark v. Rogers*, 4 Id. 97.²

This case has been endeavored to be distinguished from others by the circumstance of the master's acting for the charterers of the brig; but we concur in the opinion of the first judge, who held that the charterers were mere temporary owners of the brig, and the master put on board by them stood to the persons who furnished supplies for the brig in the same relation as a master appointed by the owner.

It has been contended that the plaintiffs charged the amount of the disbursements he now claims from the defendant to his employers, the charterers of the brig. For necessary supplies for a vessel, the remedy of the party is against the ship, the master, and owner or charterer. He loses not either his remedy against the vessel or either of these persons by charging the owner; for he may simultaneously, or at different periods, charge them all; there is no novation by implication.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

As to what will constitute a novation, see *Morgan v. Creditors*, 20 Am. Dec. 286; as to what will not. *Hobson v. Davidson*, 13 Id. 294.

SHEPHERD v. LANFEAR.

[5 LOUISIANA, 336.]

ERROR IN ADMITTING PROOF will not be cause for reversal, if the fact proved could not vary the legal responsibility of the parties.

AN AGENT FOR TWO PRINCIPALS will bind the one for whom he chooses to act, in case of a conflict of interest arising between the two, incapacitating the agent from acting for both.

THE TIME OF DELIVERY MAY BE LENGTHENED, from the time stipulated in the bill of lading, by regulations of the port of delivery, without thereby discharging the shipping contract.

THE PLACE OF DELIVERY MAY BE LIKEWISE ALTERED; therefore, where the undertaking was to deliver at the usual place of discharge at "A," and the vessel upon arrival at "A" was put in quarantine, the shipper was held liable for refusing a delivery at "B," the usual place of discharge for vessels under such circumstances.

THE case is stated in the opinion.

By Court, PORTER, J. The petitioners state that they chartered their vessel, called the *Shepherdess*, to the defendant, to

1. *Barron v. How*.

2. *Mark v. Rogers*.

carry a full and entire cargo of tobacco, in hogsheads, from the port of New Orleans to Alicant, in Spain, the cargo to be furnished at the levee in the former place, and to be delivered at the latter from the tackles of the vessel, at the charterer's expense. That in pursuance of said agreement, they did receive a cargo of tobacco on board, and carried the same to Alicant; but that the defendant refused to receive the cargo, and in consequence of his refusal the petitioners were compelled to carry it to Port Mahon, perform quarantine with their vessel, and then reship the tobacco to Alicant.

They aver that the damages they have sustained by this act of the defendant amount to eleven thousand five hundred and seventy-one dollars and fifty cents, and for which they pray judgment.

The answer of the defendant consists of a general denial. The cause was tried by a special jury, who found a verdict in favor of the plaintiffs for two thousand seven hundred and thirty-nine dollars and fifty cents. An unsuccessful attempt was made to obtain a new trial, and the court below having rendered judgment in conformity with the verdict, the defendant appealed.

The difficulty in this case has grown out of the sanitary laws of Spain. Previous to the arrival of the ship in the port of Alicant, intelligence had been received there that the yellow fever existed in New Orleans, and her cargo could not, in consequence of the quarantine regulations of that port, be landed at the usual place of discharge opposite the city. Orders were given that the vessel should proceed to port Mahon, there to undergo quarantine, but permission was given to land the tobacco at two places adjoining the town of Alicant, namely, Babil and Albufereda; the latter is distant three miles from the city; the former quite adjacent to it. On this order being issued, the captain offered to deliver the cargo according to the stipulations of the charter party. The agent of the defendant refused to receive the tobacco at either of these places, alleging that it was not a convenient place of discharge, and as the property would be subject to great and dangerous exposure at the time of debarkation and afterwards. In consequence of this refusal, the vessel was compelled to proceed to port Mahon, and land her cargo. After the usual delays, it was again taken on board, and finally delivered at Alicant.

The case therefore turns on the legality of the act of the defendant's agent in refusing to receive the cargo.

But before that question is examined, another, presented by a bill of exceptions, which appears on record, must be disposed of.

By the terms of the charter party, the consignee of the cargo was entitled to the customary commission for doing the business of the vessel. It appears to have been a matter of contest in the court below, as it has been the subject of argument here, whether by this agreement the factor of the cargo did not become also the agent of the ship, the parties deducing consequences important to their rights on either hypothesis. To sustain the ground assumed by the plaintiffs, that the agent was not to have any control of the vessel, and that the commissions promised were merely intended as an inducement to the defendant to enter into the contract of charter party, they offered in evidence the letter of instructions to the captain of the vessel on departing from this port, and the oath of a witness, who was their bookkeeper, that they kept regular mercantile books, and that there was not in the letter book a copy of any letter to the agent of the cargo. This testimony was objected to, but admitted by the judge who tried the cause.

We find it unnecessary to express an opinion on the correctness of the decision of the court below on this point, for if we were to conclude it was erroneous, we should not feel authorized to remand the cause. Admitting the plaintiffs did not consider the agent of the cargo the agent of the ship, we are of opinion that even on the supposition that he was the latter, the defendant is responsible, if the same person who was agent of the latter refused to receive it. A case can not be remanded for an error in admitting proof of a fact, when on distinct and different grounds the legal responsibility of the party to whom the evidence is opposed is the same, independent of that fact.

It has been contended that Time Le Vedras, a merchant in Alicant, to whom the cargo was consigned, was also consignee of the ship, and that, consequently, one of the joint principals can not be responsible to the other, for the act of their common agent; or that there was such an incompatibility in the authority conferred on him, in case a conflict arose between the interests of the plaintiffs and defendant, that he could not act for either.

We see no reason whatever for considering this as a case of joint mandate, unless the circumstance of an agent receiving separate powers in relation to different things from parties having interests which may clash during the agency, can constitute a joint power, which it is clear they do not. The mandatory in

this case was the agent of the plaintiffs for the ship, and of the defendant for the cargo. The powers were separate; the interests were distinct; the objects were different; and in case this difficulty, or a similar one, had not occurred, he could have discharged the duties of agent for each with perfect propriety; indeed, the very circumstance of the performance of the agency, producing a direct conflict between the duties which he owed to his respective principals, is conclusive against the idea that they were his joint mandators.

As to the incompatibility of his obligations in case of an opposition of interests in those he represented, which disabled him from acting for either, we do not perceive much difficulty in the objection. If it were true, we see no other consequence to result from it, save that the party who was in fault from the want of an agent to act for him, must bear the consequences of such want. The risk that a conflict of interests might arise, was known to both parties, and if they chose to place themselves in a situation where one might be responsible to the other from not attending either in person or by an agent, they must make good the consequent damage. Whether the non-delivery was owing to the improper conduct of an agent who had competent powers, or to the failure to appoint an agent, with competent power to act for the defendant, the result would be the same.

But be this as it may, it is clear that the agent, in this instance, as in any other of a similar kind, where a conflict of interest arises between the principals from whom he has mandates, may choose to act for one of them. That he acted in this case contradictorily with the captain, who insisted on pursuing the course most advantageous to the ship owners, results, we think, manifestly, from the whole of the evidence in the cause. The captain negatives the idea, that any orders were received from him as the consignee of the ship, by swearing that he did not act as agent of the ship owners, and his conduct through the whole transaction, if it required explanation, waives it in an answer made by him to a request of the captain, after the vessel had returned from Port Mahon, and delivered her cargo. He was called on, by the master, to assist him in recovering the freight, and he answered that he could not act as agent for the owners of the vessel, he being agent of the owners of the cargo.

The clause in the charter party, in relation to the delivery of the cargo, reads thus: "To be received at Alicant from the tackles of the vessel, at the charterer's expense and risk, within twenty-five working days from the time the vessel shall be

ready to discharge; the vessel being at the customary place of discharge for vessels of her burden." The evidence shows that Babil is not the customary place of discharge for vessels in the port of Alicant, not placed under quarantine, but that it is the customary place of discharge for goods which are considered non-contagious, and which are permitted to be landed from vessels ordered to perform quarantine at Port Mahon, or elsewhere, where there is a lazaretto. The question for our decision is, whether the customary place of discharge mentioned in the charter party, must not be understood to be the place where, under the circumstances existing at the time the vessel arrives in port, she is permitted to discharge. Valin and Boulay Paty both state, that if the acts of a foreign power, which regulate and control the place where the freight is to be delivered, present an indefinite obstacle to the performance of the charter party, it is dissolved, but that if the obstacle is temporary, the vessel should wait until it is removed, and that in such case neither shipper nor owner has the right to claim damages for the delay in the non-performance. This principle would seem to apply to detention under the quarantine laws as well as any other; and it may therefore be assumed that foreign regulations may delay the performance of the contract. If they have that force, it is difficult to say why they should not have the power to modify the mode of delivery within the port to which the cargo is to be carried. If the prohibition to land the cargo had been absolute, both parties, according to the doctrine just stated, would have been compelled to bear the consequences without any claim on each other. When it is conditional, the freighter has not, in our opinion, a right to refuse receiving the cargo on the ground that he is put to more inconvenience and expense than he would be if the vessel should perform quarantine and then land it in the usual place.

The principle just stated, that both are bound by these laws, must extend to all the limitations affixed to them, and it is evident that the doctrine is not established on the ground of a supposed equality in the injury sustained by the detention; for the cases must be frequent where delay alone produces much greater damage to one of the parties to the contract than to the other. Parties are presumed to know the usages and laws of the port where the contract is to be performed, and to contract in reference to them. The mode of delivery depends much on the usage of the place where that delivery is to be made, and if the general laws of the country change the place of delivery in

case of quarantine, the freighter is bound to receive it. There is a case in the English books, which is cited by Abbott, in illustration of the rule that the usages and customs of the port of delivery modify the rights of the party, or rather govern them under the contract. When ships, says he, arrive from Turkey, and are obliged to perform quarantine before their entry into the port of London, it is usual for the consignee to send down persons at his own expense to pack and take care of the goods, and, therefore, when a consignee had omitted to do so, and goods were damaged by being sent loose to shore, it was held that he had no right to call upon the master of the ship for a compensation. In this case it is clear that the usages of the port under the quarantine laws were considered to impose obligations on the owners of the goods, very different from those which would have arisen from the contract independent of these laws: Valin, in art. 8 of Ordinances, tit. Chartre Partie; Boulay Paty, vol. 2, p. 292; Stor. Abb. 249.

If we turn from considerations, already stated, that quarantine laws are considered to enter into the contract of the parties, and that both are bound by them, and consider this case as one where the owner of the vessel has been prevented from fulfilling the contract by the government of the country where the cargo is to be carried to, the result would perhaps be the same. It has been decided in the United States, that if goods are tendered to the consignee at the port of destination, but the landing of them was prohibited by the government of the country, that the freight was earned. This decision appears to have been made on the authority of the continental writers; and when the interruption is temporary, arising from internal regulations or custom-house restraints, it has been decided, in England, that the freighter was answerable for the delay: 4 Dall. 455; Holt on Shipping, 22.

It has been contended that the responsibility of the defendant must be limited to the number of days the vessel was detained, and that no higher damages should be given than the amount of demurrage, had she remained in Alicant; but we are of opinion that the party can only claim this on the detention of the ship in the port of delivery. Here, in consequence of the refusal of the defendant to receive the cargo, the vessel was compelled to sail for Port Mahon, and was detained there. The risk of this voyage and the wear and tear of the vessel were proper considerations for the jury.

The facts of the case, in relation to Babil being the proper

place for delivery, were much controverted in the argument. The evidence is contradictory, but after an attentive consideration of it we think it decidedly preponderates in favor of the plaintiffs. It is established that Bavi is a place where it is customary to land goods situated as these were; that the goods, with some inconvenience and additional expense, might have been landed there safely and preserved in safety. On this point the verdict of the jury has great weight with us.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs.

DESLONDES v. WILSON ET AL.

[5 LOUISIANA, 397.]

THE FINDER OF LOST PROPERTY ACQUIRES A RIGHT, upon return of the property to its owner, to any reward that may have been offered by the owner for a return.

THE REWARD MUST BE RATABLY AFFORTIONED, in case part only of the lost property is found and returned.

THE facts appear from the opinion.

Canon, for the appellant.

Preston, *contra*.

By Court, MARTIN, J. The petition states a negro slave broke open a press in the plaintiff's house, and stole therefrom a sum of about three thousand dollars, with a number of valuable papers; that he was arrested on board of a boat and jumped into a river and was drowned, and afterwards, his body being picked up, a packet containing two thousand five hundred and eighty-two dollars in bank paper was taken out of his jacket pocket, and deposited in the bank of Louisiana by the defendant Wilson, to be delivered to one of the other defendants, mayor of the city of New Orleans, on a check which the first-named defendant gave him. The present suit was brought against them and the cashier of the bank of Louisiana, for the purpose of obtaining the said packet.

The mayor deposited in court the check which the defendant Wilson had given him, and denied any agency in the matter. The cashier admitted the special deposit of the packet by the defendant, Wilson, in bank; denied having ever refused, and averred his willingness to deliver the packet on the presentation of the check.

The defendant, Wilson, admitted his taking the money from the body of the drowned slave; denied the plaintiff having ever exhibited any proof of the money being hers, and averred she was not the owner thereof, and concluded that if she established her property therein he was entitled thereout to a sum of five hundred dollars, which by an advertisement in the newspapers she had offered for the recovery of the money.

The district court allowed to the defendant, Wilson, five hundred dollars, and decreed the rest to be delivered to the plaintiff, but condemned the former to pay costs.

The plaintiff appealed, and the defendant has prayed the amendment of the judgment, so far as to relieve him from the payment of costs, and to allow that to him. The appellee's restricted prayer for the amendment of the judgment has relieved us from the trouble of any inquiry as to the plaintiff's ownership.

We are, however, to examine her objection to the allowance made to the defendant. His agency appears to have been confined to the taking the packet out of the pocket of the corpse, and its safe deposit in the bank. This does not present a claim of salvage. His claim is, therefore, a *negotiorum gestor*, or on the advertisement. In the former capacity he could not claim a great deal; but it is just that where a party endeavors to excite attention and industry for the recovery of his property, he should not be permitted to disappoint the just expectations which he has induced, or those by whose means he may regain his property.

The evidence in this case does not, however, fully support the allegation in the answer, that five hundred dollars were offered for the recovery of the money.

The advertisement announces that, besides a sum of about three thousand dollars, sundry very valuable papers, promissory notes, etc., to the amount of about fifteen thousand dollars, and a reward of five hundred dollars is offered for the recovery of the described lost property.

We have not been favored by an argument from the plaintiff's counsel; that of the appellee has urged that the advertisement states that the payment of the notes has been stopped, from which he infers that the loss of them is not very important.

The district judge has allowed the reward of appellee for the recovery of the whole property, although but a part of it has been recovered. There was property in promissory notes to the amount of fifteen thousand dollars, and in bank notes and

specie about three thousand dollars, in all, eighteen thousand dollars; the sum recovered, two thousand five hundred and eighty dollars, i. e., about one seventh part. It is true, the promissory notes being only the evidence of the debt they represent, the loss of them does not necessarily bring with it the loss of the money due, if the notes were not indorsed in blank; that the absence of them must create trouble and vexation, and will probably evade the obligation of giving security, we must presume that it was partly with the intention of averting all this that a reward of five hundred dollars was offered. It appears to us, therefore, improper that the plaintiff should pay the whole reward, while but a part of the contemplated advantage is obtained; and we think complete justice will be done to the appellee if he be allowed one half of the reward offered, but we are unable to see on what ground he was charged with costs.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided, and reversed, and that the sum of two hundred and fifty dollars be paid out of the money in bank to the appellee, Wilson, and the balance paid to the plaintiff and appellant, she paying costs in both courts.

REWARD—RIGHT OF A FINDER OF LOST PROPERTY TO.—The rights of one returning lost property may be viewed under two aspects, the one embracing that class of cases where no reward has been previously offered for such return, the other that class in which it has been. Of the points that apply to the first class, the one which seems most decidedly settled by authority is that the finder, even if he have a right to demand compensation for his reasonable and necessary expenses incurred in the securing, keeping, and preserving of the lost property, yet has no lien upon the lost property, for the purpose of securing such compensation: *Nicholson v. Chapman*, 2 H. Bl. 254. It was therefore decided that where the defendant refused to return a strayed pointer dog, unless he were first paid the expenses of the dog's keep, he was guilty of conversion: *Binstead v. Burk*, 2 W. Bl. 117. See, too, *Armory v. Flynn*, 10 Johns. 101; S. C., 6 Am. Dec. 316; *Baker v. Hoag*, 3 Barb. 203; S. C., 7 Barb. 113. But the question whether such finder has any right of recovery is one not yet fully settled. Story, in his work on Bailments, sec. 121, a, asserts the existence of such a right; and there are dicta to that effect: *Nicholson v. Chapman*, 2 H. Bl. 254; *Armory v. Flynn*, 10 Johns. 101; S. C., 6 Am. Dec. 316. There are two American cases bearing directly on the point, and the decisions arrived at in them are contradictory. The cases referred to are *Reeder v. Anderson*, 4 Dana, 193, and *Watts v. Ward*, 1 Or. 86. The first mentioned, declaring in favor of the right to reward, says: "The only question to be considered in this case is whether the law will imply a promise by the owner of a runaway slave to pay a reasonable compensation to a stranger for a voluntary apprehension and restitution of the fugitive; and though such friendly offices are frequently those only of good neighborhood, which should not be influenced by mercenary motives or expectations,

nevertheless it seems to us there is an implied request from the owner to all other persons to endeavor to secure him lost property, which he is anxious to retrieve, and that therefore there should be an implied undertaking to (at least) indemnify any person who shall, by an expenditure of time or money, contribute to a reclamation of the lost property." But in *Watts v. Ward*, 1 Or. 86, it was held that "no doctrine is better settled at common law than that the finder of lost property is not entitled to a reward for finding it, if there be no promise of such reward by the owner."

In addition it may be remarked, that if a reward is given to a finder, it must be because the law will imply a request on the part of the owner, to all persons, for the performance of such services as will save his property from destruction; and if this is so, that request should be implied in all cases where the property would be lost to the owner, if services were not performed; but such is not always the case. In *Bartholomew v. Jackson*, the case was that Jackson attempted to charge Bartholomew for his services in removing a stack of wheat belonging to the latter, from a wheat field, in which the stubble had been set burning in such manner that the stack, had it been allowed to remain, would have been destroyed by the fire. On appeal, Platt, J., delivered the following opinion: "I should be very glad to affirm the judgment; for although the plaintiff was not legally entitled to sue for damages, yet to bring a certiorari on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant, and there was in fact no promise, express or implied. If a man humanely bestows his labor, and even risks his life in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the services as gratuitous, and it therefore forms no ground of action. The judgment must be reversed." *Bartholomew v. Jackson*, 20 Johns. 28; 11 Am. Dec. 237. But where there has been a specific offer of reward, there the right of the finder to the reward is protected by the existence of a lien in his favor upon the lost property.

A leading case on this branch of the subject is that of *Wentworth v. Day*, 3 Metc. 352, where, arguing for the existence of the lien, the court say: "But in many cases the law implies a lien from the presumed intention of the parties, arising from the relation in which they stand. Take the ordinary case of a sale of goods in a shop or other place where the parties are strangers to each other. By the contract of sale the property is considered as vesting in the vendee. But the vendor has a lien on the property for the price, and is not bound to deliver it till the price be paid. Nor is the purchaser bound to pay till the goods be delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption that it was not the intention of the vendor to part with his goods till the price should be paid, nor that of the purchaser to part with his money till he should receive the goods. But this presumption may be controlled by evidence, proving a different intent, as that the buyer shall have credit, or the seller shall be paid in something other than money.

"In the present case the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was that whoever should return his watch to the printing office, should receive twenty dollars. No other time or place of payment was fixed. The natural, if not the necessary implication, is that the acts of performance are to be mutual and simultaneous; the one to give up the watch on payment of the reward, the other to pay the reward on receiving the watch. Such being in our opinion the nature and legal effect of the contract, we are of opinion that the defendant, on being ready to deliver up the watch, had a right to receive the

reward in behalf of himself and his son, and was not bound to surrender the actual possession of it till the reward was paid; and therefore the refusal to deliver it without such a reward was not a conversion. It was competent for the loser of the watch to propose his own terms. He might have promised to pay the reward at a given time after the watch should have been restored, or in any other manner inconsistent with a lien for the reward on the articles restored, in which case no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser." Other cases proclaiming the existence of a lien in similar circumstances, are *Cummings v. Gann*, 52 Pa. St. 484; *Preston v. Neale*, 12 Gray, 222; *Barber v. Hoag*, 3 Barb. 203; *Wilson v. Guyton*, 8 Gill, 213.

In addition to the lien there is a personal responsibility on the part of the owner in such cases; for the offer of a reward or compensation for the performance of any service, as, for instance, for the finding and returning of money or any lost article, is a case of a conditional promise; and if any one coming within the terms of the offer, shall, before its revocation, perform the service, a legal and binding contract arises to pay the reward: Story on Contracts, sec. 493; *Wentworth v. Day*, 3 Metc. 352; *Janvrin v. Exeter*, 48 N. H. 83; *Fitch v. Smedaker*, 38 N. Y. 248; *Hanson v. Pike*, 16 Ind. 140.

It has also been held that to entitle a person to an offered reward, for the recovery, or for information leading to the recovery of property lost, he must show a rendition of the services required after a knowledge of, and with a view of obtaining the reward. The finding of the property and advertisement thereof, without knowledge of the offer, or the giving information as to the whereabouts of the property, which information does not, in fact, lead to its recovery, does not entitle one to the reward: *Hewland v. Lounds*, 51 N. Y. 604. This because, as the services were performed without knowledge of the offer of reward, it can not be claimed that they were performed in pursuance of such offer, and therefore there was no acceptance by the finder of the offer. Where the offer for a return is of a "liberal reward," there is no lien for the finder upon the lost property. For, as owing to the uncertainty of the amount of reward offered, it may be that the determination of that amount shall be thrown in the courts, holding that the lien existed would be tantamount to depriving the owner of the possession of his property during the pendency of the litigation: *Wilson v. Guyton*, 8 Gill, 213.

THE REWARD SHOULD BE APPORTIONED in case of the return of part of the property lost: *Symmes v. Frazer*, 4 Am. Dec. 142.

WEST, SYNDIC ETC. v. McCONNELL.

[5 LOUISIANA, 424.]

THE PENDENCY OF A SUIT IN ANOTHER STATE is not matter of abatement to a suit here upon the same cause of action.

RECORDS, WHEN PROPERLY CERTIFIED.—Where two records of a court of Kentucky were produced, they being attached by being sewed together, and to the first in point of date there was a certificate of the clerk of the court alone, to the latter certificates of both clerk and judge, the certificate of this latter officer referring to the certificate of the clerk on the first record, there the first record was held properly certified.

MATTER NOT PLEADED MAY BE GIVEN IN EVIDENCE when its materiality has been caused by conduct of the plaintiff at the trial.

THE PENDENCY OF AN ATTACHMENT SUIT WITHOUT THE JURISDICTION, is reason that judgment upon the same cause of action here should be conditional, so that its execution may be stayed, unless the plaintiff dismiss the attachment suit, or if he elect to proceed in that suit, so that only the balance due on the judgment, after the sale of the attachment property, may be collected here.

THE opinion states the case.

By Court, PORTER, J. This suit is brought to recover from the defendant a debt due to the insolvent, previous to his failure, and an attachment was levied on property of the defendant, found within the jurisdiction of the court.

There were two trials in the court below, and on both the decision was in favor of the plaintiff. The proceedings in the court below, and the causes which induced the judge to order a new trial, need not be set out, as the case turns on matters which are not affected by them. The existence of the debt appears to be sufficiently proved. The principal question in the cause, relates to the effect which an attachment should have, that was levied by the plaintiff on goods of the defendant in the state of Kentucky, and which attachment was in force at the time this suit was instituted.

The defendant has pleaded the suit in Kentucky, on which the attachment issued in abatement of the present action; and he has further pleaded, that the plaintiff had, previous to the institution of this suit, funds belonging to the defendant to an amount sufficient to satisfy the claim of the petitioner.

On the first point, we think, the pendency of a suit for the same cause of action, in another state, can not abate a suit in our courts; and the principles on which this doctrine has been established, and so generally recognized, are not at all affected by the process which the plaintiff may resort to in another country to enforce or assure his rights. We can not distinguish between the effect of a suit in which attachment issued, and one where the defendant was arrested and held to bail.

But though that attachment can not deprive the plaintiff of the aid of our courts to enforce his rights, we are of opinion, for reasons which will be given hereafter, that it may have effect in modifying the relief to which he is entitled here; and it therefore becomes necessary to examine the exceptions taken to the evidence by which the defendant attempted to establish the pendency of the suit in Kentucky.

The defendant produced in evidence two records sewed together. One of the suit of the present plaintiffs against the

defendant, and another of the suit of the bank of the United States against the plaintiffs, by which they attached and seized the debt the petitioner was attempting to recover from the present defendant.

At the end of the first record there is a certificate of the clerk in due form, but it is not followed by that of the judge. At the end of the second there is also a certificate of the clerk in due form of law, and to this the following certificate of the judge is added: "I, Thomas T. Crittenden, sole judge of the Jefferson circuit court, in the state of Kentucky, do certify that Worden Pope, whose certificates and attestations are made to accompany this record, was, on the days of his certificates and attestations, viz., on the thirteenth and fourteenth days of November, 1832, clerk of the Jefferson circuit court, in Kentucky, and keeper of the seal of said court; and that his certificates are in due form of law, and entitled to full faith and credit."

On referring to the attestations of the clerk, we find that one of them was made on the thirteenth, and the other on the fourteenth, as the judge states. It is contended that his certificate can not justify the introduction of the first record, because *non constat*, that is, that which he refers to; that another record might have been obtained and attached to the last made out; and that such a loose mode of introducing documents would afford means for the practice of fraud.

It is not suggested that any attempt to substitute one record for another was made here. Such an act would be highly criminal, and the court can not presume it. We are satisfied in the present instance that the certificate of the judge refers to the two attestations of the clerk produced in evidence, and we see nothing in the act of congress which authorizes us to reject them, because the judge certified both at the same time.

But another objection is made to the introduction of the record on the part of the United States bank against the plaintiff. It is contended that the defendant should have specially pleaded the existence of the suit. We think otherwise. It is not necessary for a party to set out all the evidence on which his case is to be maintained; and more particularly, it is not required to set out matters which may or may not become material, according to the course which his adversary may adopt. In the present case, the gist of the defense was the attachment previously levied by the plaintiff on property of the defendant for the same debt. The circumstance of the right of the plaintiffs in that debt being subsequently attached, was only important in giving

further effect to that suit, and in showing that there existed impediments to the plaintiff's releasing him from the consequences of it, if he attempted to do so, to enable him to recover here.

The fact of the bank of the United States having attached the plaintiff's right to the debt due by the defendant, would not, indeed, be at all material in this case, were it not for a proposition made by the plaintiff that he was willing to renounce all benefit to the action pending in the state of Kentucky, and to make that entry on the record.

We have already stated that the pendency of the suit in Kentucky can not be pleaded in abatement, so as to cause the dismissal of the action brought in our courts, but we think the facts disclosed by the record of that suit offer controlling considerations why the judgment to be rendered in this case should not be absolute. It appears that the plaintiff has there seized and taken into possession a large amount of property belonging to the defendant. If this property had been delivered to him as a pledge or deposit, or as a collateral security for his debt, he could not seize other property to satisfy his debt without returning that which he had received to secure the payment. We can not distinguish between such cases, and those where he has resorted to the aid of a court of justice to obtain possession; and we therefore think the judgment should be conditional, that the plaintiff is not to issue execution until he returns the property seized in Kentucky; or if he prefers to proceed there and have it sold, until he credits this judgment with the net proceeds of the sales, or with the sum he may recover from the garnishees.

He contends that the release offered by him to put on record, accomplishes this object, and insists that the United States bank can not interfere with his control over a suit which he commenced. We do not think that the rights of the defendant should depend on that contingency. The question is by no means free from difficulty, and we do not know how the courts of Kentucky will decide it. The plaintiff can not complain of this delay; he has by his own act placed the defendant in a situation where there is great risk he may be compelled to pay the same debt twice, if we should render judgment against him unconditionally. It is right, therefore, that he should bear the delay necessary to have the possibility, or rather probability of so gross an injustice being removed.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that the

plaintiff do recover of the defendant the sum of three thousand six hundred and forty-six dollars and fifty-one cents, with costs of suit. And it is further ordered and decreed, that no execution shall issue on said judgment, until the plaintiff shall produce and file in the records of the district court, evidence that the attachment issued by him in the Jefferson circuit court of the state of Kentucky shall have been dismissed with leave of that court; or that if he proceeds to final judgment in said cause, until he enters as credit on the judgment now rendered, the net amount of the proceeds of the property so attached by him in the said court; and it is further ordered that the appellee pay the costs of this appeal.

EFFECT OF LIS PENDENS IN A SISTER STATE, WHEN PLEADED IN ABATEMENT.—It is well settled by authority that the pendency of a suit in a foreign court can not abate a home suit.

Of what is a foreign court, there is a definition often quoted, in this class of cases, in *Bayley v. Edwards*, 3 Swans. 703. There the attempt was to plead an English suit in abatement of a suit in Jamaica. Lord Camden, overruling the plea, said: "It is a plea to the jurisdiction, and the nature of it is so treated in *Sperry's case*. The plaintiffs here attempt to set up the suit in England in bar of the jurisdiction of Jamaica, but the causes for allowing the plea of double suits are all where the suits are in courts here; while this is of a second suit in a court which is a foreign court, inasmuch as this country has no process to enforce its decree in the islands." So all other colonial courts are, as to the English courts, foreign: *Bank of Australia v. Nias*, 16 Q. B. 717.

Further, it has been held that except where united by the constitution for national purposes, the states are foreign to each other: *Buckner v. Van Lear*, 2 Pet. 586. Accordingly it has been held, almost universally, that the plea of a suit pending in another state is not available in abatement: *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Id. 199; *Salmon v. Wooton*, 9 Dana, 422; *Newell v. Newton*, 10 Pick. 470; *Yelverton v. Conant*, 18 N. H. 123; *Davis v. Morton*, 4 Bush, 442; *De Armond v. Bohn*, 12 Ind. 607; *Smith v. Lathrop*, 44 Pa. St. 326; *McJilton v. Love*, 13 Ill. 486; *Humphries v. Davis*, 38 Ala. 199; *Drake v. Brandner*, 8 Texas, 351; *Chatzel v. Bolton*, 3 McCord, 33.

It is sometimes objected that this is repugnant to that clause of the constitution which enacts that "full faith and credit shall be given in each state to the public acts, records, and proceedings in every other state." But it is answered that this does not apply in such way; for, "though the constitution and laws of the United States require that the judgments rendered in one state shall receive full faith and credit in another, yet, in respect to all proceedings prior to judgment, the courts of the different states, acting under different sovereignties, must be considered so far foreign to each other that a remedy sought by judicial proceedings under one can not be treated as a mere and simple repetition of a remedy sought under another:" *White v. Whitman*, 1 Curt. 496; *Lyman v. Brown*, 2 Id. 559; *Hatch v. Spofford*, 22 Conn. 485; *Smith v. Lathrop*, 44 Pa. St. 326; *Walsh v. Durkin*, 12 Johns. 199.

But it is probable that a judgment in one of two suits, prosecuted simultaneously, would, upon being pleaded *puis darrein continuance*, be a bar to

the other: *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Id. 199; *DeArmond v. Bohn*, 12 Ind. 607; Freeman on Judgm., sec. 221. In fact, as a cause of action merges into a judgment as soon as this latter is obtained, and as judgments of the respective states are entitled to "full faith and credit" in all of the others, that result seems a necessary one.

Of the cases favoring the opposite view, that is, that a suit in a sister state is properly pleaded in abatement, are: *Ex parte Balch*, 3 McLean, 221, and *Hart v. Granger*, 1 Conn. 154; but the latter case was overruled in *Hatch v. Spofford*, 22 Conn. 484. Where there is a trustee process pending in another state, can the debtor therein, summoned as garnishee, plead that fact in abatement of a suit brought against him, within the jurisdiction, by his creditor? The authorities are conflicting. In *Embree v. Hanna*, 5 Johns. 101, the plea in abatement showed that Hanna had, in an action brought in Maryland against Embree, been summoned as garnishee. It was held that the plea was good, and that, in consequence, the action should abate. In *Irvine v. Lumbermen's Bank*, 2 Watts & S. 190, an analogous case, the court say: "That the proceedings in New York are a defense in this state admits not of a doubt. They are a defense, and must be pleaded in the same manner as if they had been laid in this state, there being a manifest distinction between a suit pending in a foreign country, between the same parties, commenced by process against the person, and a proceeding by foreign attachment, which proceeds *in rem*. The latter may be pleaded either in abatement or in bar, according to the distinction which will be hereafter noticed, whereas the former can be neither pleaded in abatement nor in bar, unless perhaps where the cause has proceeded to judgment." See, also, *Wallace v. McConnell*, 13 Pet. 136; *Scott v. Coleman*, 5 Litt. 349; 15 Am. Dec. 71.

Upon the other hand, in Massachusetts it is held, that where a defendant pleads that he has been summoned by trustee process, in a suit brought, within the state, against his creditors, this is matter not of abatement, but only sufficient to continue the case: *Winthrop v. Carlton*, 8 Mass. 456; and it is hardly probable that greater effect would be given to a suit pending without the jurisdiction than to one within. The same view is taken in California as in Massachusetts: *McFadden v. O'Donnell*, 18 Cal. 160; *McKeon v. McDermott*, 22 Id. 667. In Louisiana also, where one had been summoned as garnishee and pleaded a prior garnishment in Pennsylvania, judgment was entered against him, but a stay of further proceedings was ordered, to await the determination of the Pennsylvania suit: *Carrol v. McDonogh*, 10 Mart. 609; while in Vermont, it is held that the rights of the principal debtor in a trustee process, for every purpose of making demand of his debtor, who is summoned as trustee, or securing his claim against the trustee, by attachment or otherwise, remains unimpaired by the pendency of the trustee process, but they subsist, however, in subordination to any lien created by such proceeding: *Hicks v. Gleason*, 20 Vt. 139; therefore, though there may be judgment against a debtor summoned as garnishee, execution of the judgment will be stayed to await the determination of the trustee process. In Alabama, also, it is held, that where one has been summoned in the United States court, as garnishee, that can only give right to a continuance in a suit brought against the garnishee in the state courts: *Crawford v. Slade*, 9 Ala. 887; see also *Smith v. Blatchford*, 2 Ind. 184. In other of the states, a trustee process pending within the jurisdiction, is cause of abatement, but whether it would be so if pending without, is a question that has not arisen: *Haselton v. Monroe*, 18 N. H. 598; *Brown v. Somerville*, 8 Maryland, 444. The question, therefore, it seems, is one which will probably receive a different answer in different states.

LIS PENDENS IN A FEDERAL COURT.—In the case of a *lis pendens* pleaded as existing in a federal court for the same state, the suit in the state court will abate: *Smith v. The Atlantic M. F. Ins. Co.*, 2 Fost. 21; and so if a suit in a state be pleaded to a suit brought in the federal court of the same state, the same consequence will follow: *Earl v. Raymond*, 4 McLean, 235. But if the courts be in different states, that is, if the state court be in New York, the federal court in Maryland, there neither suit will abate: *Walsh v. Durkin*, 12 Johns. 99; *White v. Whitman*, 1 Curt. C. C. 494. Nor is it matter of abatement to a suit brought by "A." in the federal court against "B." that there is a suit pending in the state court upon the same cause of action, but brought there by "B." against "A.": *Wadleigh v. Veazie*, 3 Sumn. 165. See, further, as to the effect of a plea that a suit for the same cause is pending in a United States court sitting within the state, *Mitchell v. Bunch*, 22 Am. Dec. 669, and citations in the note thereto.

KEENE v. LIZARDI ET AL.

[5 LOUISIANA, 431.]

THE MASTER IS LIABLE as for breach of duty for inhuman and indecent conduct towards the passengers, by himself and crew, where incited by him.

THE OWNERS OF A VESSEL ARE LIABLE for all breaches of duty of the master in his conduct towards passengers.

THE facts appear from the opinion.

Appellant in propria persona.

C. De Armas, contra.

By Court, PORTER, J. The petition states that the plaintiff and his wife embarked at Vera Cruz, as cabin passengers, on board a schooner belonging to the defendants, bound to the port of New Orleans. That the vessel had on board a nominal commander called Narciso Fernandez, but that the real and effectual commander was one Manuel Gastanaga, who was entitled the *piloto*. That the said *piloto*, virtually and effectually the sole and absolute commander of said vessel during said voyage, availed himself of every occasion to violate not only the rules of decency, decorum, and respect, but also to outrage humanity itself towards the petitioner and his wife, and to expose their very lives to be sacrificed to his unofficer-like and atrocious conduct. That, furthermore, to gratify his fiend-like malignity and brutality, he, the said *piloto*, spoke also of the wife of the plaintiff, in the hearing of all his crew, as if to stimulate them to personal outrage against her, as not being the wife, but the mistress or prostitute of the plaintiff; and finally, that during the space of fourteen days, owing to the

atrocities of the *piloto*, the petitioner and his wife were in constant apprehension of being assassinated. The damages are laid at twenty thousand dollars, and it is averred that the defendants, as owners of the vessel, are responsible for the acts of their agents.

The defendants filed a peremptory exception, in which they denied that they were responsible to the plaintiff on the facts alleged by him, the court below sustaining the exception. The judge admitted the owners were responsible for loss occasioned by the neglect, and even by the torts of their agents, but that they were not responsible for malicious and defamatory expressions of the officers on board.

For the purposes of this inquiry, all the facts and allegations contained in the petition must be taken as true. It therefore appears the officer in command of the vessel treated the petitioner and his wife inhumanly and indecently; that he did not extend to them that protection and care which is usual; that he stimulated his crew to commit outrages on them, and that during the space of fourteen days they were, in consequence of his conduct, in constant danger of their lives.

The questions, therefore, are whether the officer himself would be liable to an action for such conduct? and if he would, whether the owners of the vessel are responsible for his acts?

1. And on the first question we are clearly of opinion, that if such acts as are admitted by this exception, were proved in evidence, the master would be responsible in damages to the parties injured. We were about to express our own ideas on the obligations of masters to passengers, when we fell on a case not cited on the argument, where the law on the subject is so clearly stated, and in language so much more forcible than any we could employ, that we shall resort to it as expressing fully our ideas on this subject. In the case of *Chamberlain v. Chandler*, reported in 3 Mason 242, Judge Story says: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther: it includes an implied stipulation against general obscenity, that immodesty of approach

which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors, by the excitement of terror and cool malignancy of conduct, to inflict torture on susceptible minds." After noticing the argument that the acts complained of, though wrong in morals, were not cognizable by law, he observes: "My opinion is, the law involves no such absurdity. It is rational and just. It gives compensation for mental suffering, occasioned by acts of wanton injustice, equally, whether they operate by way of direct or consequential damage." If the principles here so eloquently expounded, and which we think must receive the ready assent of every sound head, and of every pure heart, required the further weight of authority to give their sanction, we have that authority in Chancellor Kent. "The duties of the master (he says), and particularly the necessity of kind, decorous, and just conduct on the part of the captain to the passengers and crew under his charge, and the firm purpose with which courts of justice punish, in the shape of damages, every gross violation of such duties, are nowhere more forcibly stated than in the case of *Chamberlain v. Chandler*:" 3 Kent Com., ed. 1832, 160.

2. On the second point, the exposition just given of the duties of the master, in relation to the passengers, renders it easy to ascertain the extent of the responsibility of the owners for a breach of those duties. The law is clear and perfectly well settled, that owners of vessels are responsible for all acts of the master, while acting within the scope of his duties, even for his torts. When the proprietors of vessels use them for the purpose of carrying passengers for money, they subject themselves to the same responsibility for a breach of duty in their officers to those passengers as they would for their misconduct in regard to merchandise committed to their care. No satisfactory distinction can be drawn between the two cases.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be reversed and annulled; and it is further ordered that the exception filed in this case be overruled and set aside; that the case be remanded to the district court, to be proceeded in according to law, and that the appellees pay the cost of this appeal.

That the owner is liable for the tortious acts of the master, done within the scope of employment, see *Malpica v. McKown*, 20 Am. Dec. 279; *Araye v. Carrell*, Id. 286.

RABASSA v. ORLEANS NAVIGATION COMPANY.

[5 LOUISIANA, 461.]

A CORPORATION IS RESPONSIBLE for the acts of its agents done within the scope of its business and at its command, and in general for all injurious acts done by it, unless specially excused by law from responsibility therefor.

THE case appears from the opinion.

Strawbridge, for the appellants.

Preston, contra.

By Court, PORTER, J. The petitioner states that he is the sub-lessee of the defendants of a road on which, by virtue of the thirteenth section of the act incorporating the Orleans Navigation Company, tolls were receivable; that the company, through their agents, have taken possession of the road, and by filling it up with soft marsh soil, have rendered it impassable. The damages sustained by the plaintiff from these acts are averred to be five thousand dollars.

The answer denies the responsibility of the defendants for the acts alleged in the petition, and puts at issue the facts therein set forth.

The cause was submitted to a jury, who found a verdict in favor of the plaintiff for sixteen hundred dollars. The defendants applied for a new trial, but the court rejected the application, and gave judgment in pursuance of the verdict. From this judgment the defendants have appealed.

A bill of exceptions was taken on the trial to the introduction of proof on the part of the plaintiff that he had leased the road. The objection rests on the fact that at the time the lease was adjudicated, the conditions on which the road was let had been reduced to writing, and announced to the lessee. And that the adjudication itself had been reduced to writing by the auctioneer. No written contract was, however, entered into, and signed by the parties. The plaintiff went into possession, and has since paid the rent to the lessors.

We do not think the court erred. This is not one of those cases where the law has constituted a written instrument the authentic and sole medium of proving the fact. Leases may either be verbal or written. In contracts of the former kind, instruments defective and inoperative in themselves may be confirmed or supported by oral testimony, or operate in conjunction with that part which is reduced to writing. The writings

in question were not signed by the plaintiff, nor, as far as we can learn, ever seen by him. The lease was therefore by parol. We are perfectly satisfied the plaintiff had the right to offer the evidence objected to: Stark. on Ev. 4, 1034.

The main question in the cause relates to the responsibility of the defendants for such an act of their agents as is alleged in the petition.

The textual provisions of the Louisiana code are cited to show no such responsibility exists. A corporation (it is so enacted), can not beat or be beaten in its corporate capacity; it can not commit the crime of high treason, or any other crime or offense in its corporate capacity, and it can only contract through its agents: La. Code, 428, 429, 432, 433. Several references have been made to writers who treat of corporations, as supporting the same doctrine, but it is unnecessary to cite them, for the general principle is nowhere more strongly stated than in the positive law of the state.

But it appears to us the rules just referred to leave the question now before us entirely open. That question, as we understand it, is, whether corporations are not civilly responsible for damages occasioned by acts of their agents in relation to matters coming within the scope of the object for which they were incorporated, when these acts were done by their command.

There can be little doubt the law should make them liable; and we think it does hold them so. The passages cited from our code relate to crimes and offenses, and as that work enumerates the cases where corporations are not responsible, and does not embrace within that enumeration non-responsibility, in a civil action, for injuries done to property, a very strong reason is offered to us against extending the exemption to a case not enumerated. The objection raised, that they are not responsible because they can only contract through an agent, aids very little in the decision of the point now under consideration; for though they can only contract through an agent, it by no means follows that they are not responsible for breaches of contract which they may have entered into, or for injuries which they may inflict on the property of others through their agents. If they rented a house and committed waste during the lease, or made themselves responsible by the non-performance of any obligation which the law imposes on the lessee, it can hardly be questioned they would be bound to make good the loss. If it be objected that, in the case last put, the responsibility grew out of a contract, we can hardly see how their

liability would be varied if, without a contract, they entered on the property of another, and used it for corporate purposes. Though corporate bodies can enjoy no rights, nor exercise any powers, but those conferred by law, we are not therefore authorized to conclude that they are responsible for no acts but those which the law expressly declares they shall be responsible for. On the contrary, we think they are bound to others for every injurious act on their part, from which the law has not specially exempted them. No such exemption is shown here. The law of the *Partidas*, relied on, is no longer in force, and was not at the time this trespass was committed.

In England, by a statute of 21 Edward IV., it is holden, that a corporation can not be beaten, nor beat, nor commit treason, nor felony, nor be imprisoned for disseisin with force, nor be outlawed. These enactments are much the same with these cited from our code, yet the books of adjudged cases in that country, and in our sister states, afford repeated examples of corporations being held liable for trespasses committed by their agents under their authority. Chancellor Kent says, they may be sued by a special action on the case for neglect, and breaches of duty, and in actions of trespass and trover for damages, resulting from trespasses and torts committed under their authority by their agents: 2 Kent Com. 284; 3 Pet. 398.

It is objected that there is no evidence on record, that the navigation company authorized the trespass; we think it results from the evidence of the defendants themselves, that they did authorize it.

The right of the lessors to interfere with the road, on the ground that it stood in need of repairs, was a question depending on the fact, whether the road did actually require the repairs or not, and that fact the jury has negatived by their verdict.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed, with costs.

A corporation is liable for torts: *Riddle v. Proprietors*, 5 Am. Dec. 235; *Chestnut Hill T. Co. v. Rutter*, 8 Id. 675; *Lyman v. White River Bridge Co.*, 16 Id. 705.

PARGOND v. GUICE, ADMINISTRATOR.

[6 LOUISIANA, 75.]

THE PLAINTIFF'S BOOKS OF ACCOUNT can not be used to refresh the memory of a witness unless the entries used for that purpose were made by the witness.

AN ALLEGATION IS TOO GENERAL TO ALLOW OF PROOF in its support, if it is to the effect, "that plaintiff is indebted to defendant in the sum of," etc.

THE facts appear from the opinion.

By Court, MARTIN, J. The defendant resisted the claim against the estate on the ground that the plaintiff was not a creditor of one thousand and fifty-four dollars and twenty-nine cents, as he stated, but was a debtor of the deceased for four thousand six hundred and sixty-nine dollars and fifty-five cents; and on these grounds the plaintiff had judgment, and the defendant appealed.

His counsel took two bills of exceptions in the court below; the one was to the court allowing the plaintiff's books to be introduced for reference, by his clerk, who was offered as a witness to establish the items in plaintiff's account; and the other was to the refusal by the court to receive in evidence certain documents, by which the defendants wished to prove that the plaintiff owed to the estate.

We think the court erred in permitting the use of the plaintiff's books, and permitting the witness to resort to them to refresh his memory. There is not a clearer rule of evidence than that which declares the plaintiff's books not to be evidence for him; and that a paper which could not be read in evidence may be resorted to by a witness to refresh his memory, as a memorandum made by himself. It is not pretended that the entries in the plaintiff's books, to which the witness was permitted to recur, had been made by himself. They might have been made by another clerk, or the plaintiff himself, or by his order and direction.

But we think the court of probates consistently rejected the documents by which the defendant sought to prove claims on the estate of the plaintiff. These claims were not pleaded in compensation or reconvention, nor set up in such a manner as to enable the plaintiff to be informed of their nature or amount, so to be able to disprove or admit them. A general allegation of the plaintiff's being indebted in a gross sum, without any certificate of the time, place, or manner in which the claim accrued, is too vague to authorize the admission of proof in support of it.

It is therefore ordered, adjudged, and decreed that the judgment of the court of probates be annulled, avoided, and the case remanded, with directions to the judge not to allow the plaintiff's witness to refresh his memory by a reference

to the plaintiff's books; the costs of appeal to be borne by the appellee.

BOOKS OF ACCOUNT AS MEMORANDA TO REFRESH THE MEMORY of a witness:
See the note to *Union Bank v. Knapp*, 15 Am. Dec. 194.

TEXADA v. BEAMAN.

[6 LOUISIANA, 84.]

A POWER TO COLLECT and do acts necessary to effect a collection, does not authorize the agent to transfer a debt.

PETITION for an injunction to stay proceedings on a judgment. The judgment had been obtained by P. and R. Peebles, against Martha Welch. The plaintiff claimed that the judgment had been transferred to him by the attorney in fact for Peebles. The answer of defendants denied the sufficiency of the agent's authority.

Thomas, for the plaintiff.

Dunbar, contra.

By Court, PORTER, J. This case turns entirely on the authority of an agent to transfer a debt. He was empowered to collect, and do all acts necessary to effect the collection. Under this power he passed the claim to a surety of his principal, in order to protect the transferee from the consequences of his engagement. We are of opinion he had no authority to do so, and it is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

AGENT TO COLLECT is not authorized to compromise or sell the claim or receive anything but money in payment: See the note to *Martin v. United States*, 15 Am. Dec. 130.

C A S E S
IN THE
SUPREME JUDICIAL COURT
OF
M A I N E.

ELDER v. ELDER.

[10 MAINE, 80.]

PAROL EVIDENCE IS INADMISSIBLE IN A SUIT in equity to reform a written contract, to show that a mistake exists therein, and that the contract, by the terms of which it appears that the vendor agreed to convey to the vendee "a lot of land situated in Windham," was intended to convey the whole of a particular lot, part of which was situated in another town.

BILL filed by Joseph Elder against the administrator and heirs at law of Reuben Elder, deceased, alleging that on the seventeenth day of October, 1830, plaintiff entered into a contract with Reuben for the purchase of a tract of land lying in the towns of Windham and Westbrook; that the purchase price, three hundred dollars, was to be paid in installments, and that the deed for the land was to be executed upon the payment of the first installment which plaintiff had paid. The bill also alleged that, by mistake, the land was described in the memorandum signed by Reuben, as "a lot of land situated in the town of Windham, formerly owned by John Elder." Plaintiff prayed that the mistake might be corrected and the defendants required to convey to him the whole lot claimed. Defendants answered and set out the memorandum as above alleged, denied all knowledge of any other agreement, and alleged their willingness to convey the land in Windham according to the memorandum. Several depositions were taken, tending to prove by the admissions of Reuben, and otherwise, that there was a mistake in the contract as alleged. The principal question presented was, as to the admissibility of such testimony.

Daveis, for the plaintiff. Parol evidence was admissible to correct the mistake in the contract: 1 Madd. Ch. 49; 2 Atk. 33, 50; Sugd. on Vend. (2d ed.) 107 *et seq.*, and cases there cited; *Bradbury v. White*, 4 Greenl. 391; *Dunlap v. Stetson*, 4 Mass. 349; *Washburn v. Merrills*, 1 Day, 139 [2 Am. Dec. 59]; *Marks v. Pitt*, 1 Johns. Ch. 594; *Lyman v. U. S. Ins. Co.*, 1 Id. 630; *Gillespie v. Moon*, 2 Id. 585 [7 Am. Dec. 559]; *Abbe v. Chappel*, 7 Conn. 270; *Paterson v. Hull*, 9 Cow. 747; *Davenport v. Mason*, 15 Mass. 85; *Brown v. Gilman*, 13 Id. 158; *Wilkins v. Scott*, 17 Id. 251; *Codman v. Winslow*, 10 Id. 146; *Leland v. Stone*, Id. 459; *Fowle v. Bigelow*, Id. 379; *Hathaway v. Spooner*, 9 Pick. 23; *Allen v. Bates*, 6 Id. 460; Fonbl. Eq. c. 3, sec. 6; 1 Stark. Ev. 1027.

Longfellow, contra. The granting of the prayer of this bill would, virtually, be repealing the statute of frauds. The plaintiff by this bill proposes to alter, vary, and destroy the statute, by superadding to a writing, matter gathered from the loose and uncertain recollections of witnesses. This, the law will not permit: Madd. Ch. 405, 406; *Manning v. Lechmore*, 1 Atk. 453; *Butler v. Cook*, 1 Sch. & Lef. 39; *Pyms v. Blackburn*, 3 Ves. 34; *Lawson v. Lord*, Dick. 346; *Hunt v. Rousmanier*, 2 Mass. 342; *Colson v. Thompson*, 2 Wheat. 341; *Dwight v. Pomeroy*, 17 Mass. 354 [9 Am. Dec. 148].

By Court, *Weston, J.* The plaintiff claims relief upon the ground of mistake in the terms of a contract, entered into between himself and Reuben Elder, deceased; and he prays for an amendment and enforcement of the contract, according to the true intent and meaning of the parties, and for such general relief as the court may grant. All knowledge of the existence of a mistake being denied in the answers, the plaintiff has proceeded to adduce parol proof of the allegations in his bill.

This kind of proof is objected to by the counsel for the defendants, as incompetent to alter, vary, or contradict a written instrument, plain and intelligible in its terms. That this is inadmissible at law, is a principle well settled, and it is insisted that it is a rule of evidence equally binding upon courts of equity. If the inquiry was, what contract have the parties made, this is to be ascertained by the best evidence the nature of the case admits. It is the rule at law, because calculated to elicit and establish truth. And what is best adapted to produce this effect, does not depend upon the character or jurisdiction of the tribunal before whom the question may arise.

It would tend to pervert, rather than to establish, justice, if the rules of evidence were so varied in different courts, that in the one, facts were to be proved by the best evidence, while in the other, that of an inferior character might be received, and substituted. We do not so understand the law. What contract the parties have actually made, must depend upon the same evidence, both at law and in equity. And if made in writing, what is written is the best evidence of this fact, which can not be varied, altered, or changed by parol testimony. But in both courts it may be shown by parol evidence to have been tainted by fraud, and, therefore, not binding or operative upon the party attempted to be charged. But in a court of equity other circumstances may, in certain cases, become the subject of inquiry, not to show what contract was made, but whether it was made or entered into by mistake or accident. Whether these inquiries have promoted the cause of justice, or whether they have not more frequently defeated it, by opening a door to fraud and perjury, or whether they may not occasion more mistakes than they correct, are questions which it does not belong to us to decide. This branch of equity jurisdiction is of recent origin in our state; but having been conferred upon this court, it is to be exercised according to the rules and practice of courts of equity in that country from which we have derived our jurisprudence, except so far as they may have been changed or modified by our laws.

We have jurisdiction expressly given in cases of mistake. How are they to be proved? They must depend upon extraneous testimony. They are rarely apparent upon the face of the instrument to be affected. Although its terms may often lead to a conjecture that there may have been some mistake, the fact must almost uniformly be proved *aliunde*. It may often be made out, or rendered highly probable, by a recurrence to other written evidence; as where the instrument executed is found not to conform to a previous written agreement, in relation to the subject-matter. And yet this is not conclusive; for it might very fairly be urged in comparing both, that the variance was designed and occasioned by the consent of the parties. Parol testimony is so generally admitted in chancery to prove a mistake, that in *Baker v. Paine*, 1 Ves. 456, Lord Hardwicke inquired, "How can a mistake in an agreement be proved but by parol?"

It is well settled that it is admissible on the part of the defendant, upon a bill for the specific performance of a contract. The reason assigned is, that this is a class of cases in which a court of

equity will exercise or withhold its power at its discretion, and that it will not interfere in favor of the plaintiff to enforce performance, where a mistake essentially affecting the contract is made to appear: *Joynes v. Statham*, 3 Atk. 388; *Rich v. Jackson*, 4 Bro. C. C. 514; *Ramsbottom v. Gosden*, 1 Ves. & B. 165; *Townshend v. Stangroom*, 6 Ves. 328, and the cases there cited.

In *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559], the learned chancellor maintains that relief may be had in chancery against any deed or contract in writing, founded in mistake or fraud. That the mistake may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defense. We have looked into the cases cited by him, but are not satisfied that they sustain the doctrine to the extent which his language would seem to imply. In some of them, parol evidence of mistake was admitted on the part of the defendant, to rebut an equity. In others, contracts not relating to real estate, but of a personal character, were reformed or amended upon parol proof of mistake. These cases show that this has sometimes been done in courts of equity, but under what circumstances it is unnecessary to state, as the contract before us is one relating to real estate.

Others are referred to, where mistakes in marriage settlements have been corrected by proof *aliunde*. In all these cases there was written evidence to amend by, either resulting from the plain intentions of the parties, although defectively expressed, or from previous instructions, or subsequent declarations in writing. In *Rogers v. Earl*, Dick. 294, the facts of which are reported in Sugd. Vend. 124, it plainly appeared by the settlement, that the wife was to have the power she exercised in favor of her husband, but by an omission, by mistake of the limitation to the wife for life, and to trustees to preserve contingent remainders, which were required by written instructions, the power could not, without correction, be legally exercised, to effect which the settlement was ordered to be rectified.

In *Walls v. Bullas*, 1 P. Wms. 60, a voluntary conveyance to a brother of the half-blood, defective at law, was sustained in equity against the heir at law, the lord keeper being of opinion that as the consideration of blood would at common law raise a use, the same consideration would in that imperfect conveyance raise a trust, which ought to be made good in equity. The authority of this case, however, was controverted by Lord Hardwicke in *Goring v. Nash*, 3 Atk. 189.

In *Randal v. Randal*, 2 P. Wms. 464, the husband executed a

deed, in which he acknowledged a mistake in the family settlement, to correct which he covenanted that he would stand seised of the premises in trust for himself and his wife, for their joint lives, remainder in trust to the heirs of their two bodies, remainder in trust for the wife and her heirs, with a covenant from the husband to convey the premises to these uses. And the lands were decreed to be settled accordingly.

In *Barstow v. Kilvington*, 5 Ves. 593, the wife, after the decease of the husband, wrote to the plaintiff, Barstow, who was about to marry one of her daughters, informing him in what manner she had agreed to settle the estate in question. The marriage took effect. By the legal construction of the settlement referred to in the letter, the daughter was entitled to a less portion; but the settlement was reformed according to the letter, against the heir at law of the wife. Upon a bill in equity founded upon the letter, she would have been bound to have made good the agreement as there set forth, and her heir at law, coming in under her, was affected by the same equity.

Chancellor Kent further cites cases where defects in mortgages have been made good against subsequent judgment creditors, who came in under the party bound in conscience to correct the mistake. As where A. surrenders a copyhold by way of mortgage, but the surrender was not presented at the next court, and then became a bankrupt, this mortgage was held good in equity against his assignees: *Finch v. The Earl of Winchelsea*, 1 P. Wms. 277. And so, as was held in that case, an agreement in writing to convey, upon an adequate consideration paid, is a lien in equity upon the land against the judgment creditors of the party, although not against a mortgagee without notice. But the assignees of a bankrupt are affected by every equity which would bind the bankrupt himself.

We do not regard the precedents in relation to personal contracts as authorities in this case, which, having relation to real estate, is under the protection of the statute of frauds. That statute is not formally pleaded; but the contract actually executed in writing is set forth in the answer, and it is relied upon by the counsel for the defendants to repel the parol proof set up by the plaintiff to vary its terms.

Marriage settlements are little known or used in this state; and although sometimes rectified or reformed in England, where mistakes have intervened, yet we have not found any case of the kind where this has been done upon parol testimony without written evidence to amend by; nor are we aware that it could

be done without violating the statute of frauds. In respect to mortgages we have a system of our own, depending on statute, which varies in many respects from the law as administered in the English courts of equity, and in the state of New York.

But the case of *Gillespie v. Moon* itself is relied upon as an authority in favor of the plaintiff. The defendant there had agreed to purchase two hundred acres of land, the location and bounds of which were well understood. But by mistake, clearly proved by parol, the deed embraced fifty acres more. The defendant, perceiving his advantage, although he acknowledged the mistake to several persons, insisted upon holding all the land covered by his deed. This claim, so clearly against equity and good conscience, was strongly tinctured with fraud; for there is little difference in moral turpitude, between fraudulently making a deed conveying more than is intended by the parties, and attempting to hold the same advantage where it arises from mistake or accident. Indeed, fraudulent conduct is distinctly imputed to him in the opinion of the court. The chancellor says: "The only doubt with me is whether the defendant was not conscious of the error in the deed, at the time he received it and executed the mortgage, and whether the deed was not accepted by him in fraud, or with a voluntary suppression of the truth. That fraudulent views very early arose in his mind is abundantly proved." If it was a case of fraud, as well as of mistake, there could be no question either of the admissibility of parol testimony or that the plaintiff was entitled to relief. Indeed he would have been so entitled at law. But the measure of relief would have varied.

At law, a fraudulent deed is entirely void. In equity, its effect may be defeated only so far as it is intended to have a fraudulent operation. But aside from the fraudulent views, which may always be imputed to a party, who would take advantage of a mistake that alone may be regarded in equity as an infirmity calling for relief, where it goes to the whole subject-matter of a conveyance, or where it affects only a part of it? It is not charging a party upon an executory contract in relation to real estate which can not be enforced, unless in writing; but it shows defects to defeat the operation of a written contract. It is in the nature of an injunction upon a party not to avail himself of an advantage against good conscience. It does not make a new contract, but examines the quality, extent, and operation of one formally executed by the parties. It is one thing to limit the effect of an instrument, and another

to extend it beyond what its terms import. A deed by mistake conveys two farms, instead of one. If the suffering party is relieved in such a case by a court of chancery, full effect is not given to the terms of a written instrument. But the statute of frauds does not prescribe what effect shall be given to contracts in writing; it leaves that to be determined in the courts of law and equity. A deed conveys one farm, when it may be proved by parol that it should have conveyed two. Here equity can not relieve without violating the statute. To do so, would be to enforce a contract in relation to the farm omitted, without a memorandum in writing, signed by the party to be charged, or by his authorized agent. These are distinctions which may be fairly taken between the case cited from New York, where the plaintiff sought to be relieved from the undue operation of a deed which conveyed too much, and the case before us, where the prayer of the plaintiff is, that a contract in writing may be so extended by parol testimony as to embrace more land than that contract covers. But whether this court, sitting as a court of equity, would receive parol evidence of a mistake in a deed, to restrain its operation, it is not necessary to decide. There may be great appearance of equity in such a proceeding; but it may admit of question whether more perfect justice would not be administered by holding parties to abide by their written contracts, deliberately made, and free from fraud. As far as this rule has been relaxed by the clear, unequivocal, and settled practice of chancery, we are doubtless bound by it in administering that part of our system, but we are not disposed to adopt any new or doubtful exception to so salutary a rule.

In *Jordan v. Sawkins*, 3 Bro. C. C. 388; 1 Ves. 402; *Rich v. Jackson*, 4 Bro. C. C. 514; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Woollam v. Hearn*, 7 Ves. 211; and in *Higginson v. Clowes*, 15 Id. 516, the doctrine maintained is, that a party seeking the specific performance of an agreement, and proposing to introduce new conditions, or to vary those which appear in a written instrument, will not be permitted to do so by parol testimony. And in *Dwight v. Pomerooy et al.*, 17 Mass. 303 [9 Am. Dec. 148], Parker, C. J., regards this principle as fully settled by the more recent chancery decisions in England, and that a few cases, bearing a different aspect, have been explained away or overruled by subsequent decisions.

Upon full consideration of the authorities, we are of opinion that the plaintiff has not made out his case by competent proof. The bill is accordingly dismissed, but without costs, as there

is reason to doubt whether the written instrument truly expresses what had been agreed between the parties.

In *Ruhling v. Hackett*, 1 Nev. 365, Lewis, C. J., in delivering the opinion of the court, thus comments upon the principal case: "It is claimed by respondent's counsel, that the mortgage in this case can not be reformed so as to make it include land not described in it at the time of its execution, though it be admitted that it was written by fraud or mistake; that an instrument for the conveyance of land may be reformed so as to diminish the quantity conveyed, or agreed to be conveyed, but not to extend it to land not described in the deed or agreement, because it is said to order the conveyance of land which, by mistake or fraud, is omitted from the deed, is in violation of the statute of frauds, which declares that no estate or interest in land shall be created, granted, or assigned, unless by deed or conveyance in writing, signed by the party granting the same; but that ordering a reconveyance of land which is conveyed by fraud or mistake, is not in violation of this statute. For this distinction we find no authority but the dictum of Weston, J., in the case of *Elder v. Elder*, 10 Me. 80, who, whilst acknowledging the authority of the case of *Gillespie v. Moon*, 2 Johns. Ch. 585; S. C., 7 Am. Dec. 559, yet endeavors to draw the distinction above stated between the two cases. That distinction may have been clear and entirely satisfactory to the learned judge who delivered the opinion in *Elder v. Elder*, but we must acknowledge it to be utterly beyond our comprehension." So in *Tilton v. Tilton*, 9 N. H. 385, 392, the principal case was criticised, and the rule as there established, was stated not to be the true rule of chancery jurisprudence. "In *Elder v. Elder*, 1 Fairf. 80, it is said, 'a deed conveys one farm, when it may be proved by parol that it should have conveyed two. Here equity can not relieve without violating the statute.' And it is thus attempted to distinguish that case from *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559], where the deed conveyed too much land. If this position rests upon the provision of the Maine statute, it may be well enough. But we can not accede to it as the true rule of chancery jurisprudence, to be derived from the adjudged cases in England and America. In our opinion, a court of equity is competent to correct and reform any material mistake in a deed or other written agreement, whether that mistake be the omission or insertion of a material stipulation; and whether it be made out by parol testimony, or be confirmed by other or more cogent proof."

An examination of subsequent decisions in Maine fails to show that *Elder v. Elder* has ever been overruled, although in *Farley v. Bryant*, 32 Me. 474, it was held that parol evidence was admissible to establish a mistake in a deed, and that upon such evidence the deed might be reformed. The principal case is not entirely without support in other states. In *Glass v. Hubbard*, 102 Mass. 24, 35, it was cited with approval, and the distinction between it and *Gillespie v. Moon*, 2 Johns. 585; S. C., 7 Am. Dec. 559, was thus stated by Welles, J.: "The principle which was maintained by Chancellor Kent, and upon which the English authorities were cited by him in *Gillespie v. Moon*, was that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the contract of the parties, might be afforded to a plaintiff seeking a modification of the contract as well as to a defendant resisting its enforcement. That proposition must be considered as fully established: 1 Story Eq., sec. 161. It is quite another proposition to enlarge the subject-matter of the

contract, or to add a new term to the writing by parol evidence, and enforce it. No such proposition was presented in the case of *Gillespie v. Moon*, and it does not sustain the right to such relief against the statute of frauds." See *Stockbridge Iron Co. v. Hud. Iron Co.*, 107 Mass. 321; *Wilcox v. Lucas*, 121 Id. 25; *Climer v. Hovey*, 15 Mich. 18; *Moale v. Buchanan*, 11 Gill & J. 314; *Osborn v. Phelps*, 19 Conn. 63. In the note to *Gillespie v. Moon*, as reported in this series, 7 Am. Dec. 567, the principal case is cited and compared with it and other cases there cited.

PAROL EVIDENCE TO VARY WRITTEN CONTRACT.—The general rule is that parol evidence is inadmissible to vary or explain an agreement in writing, unless it is ambiguous in itself: *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 304; *Gardiner M. Co. v. Heald*, 17 Id. 248; *Perrine v. Cheeseman*, 19 Id. 388; *Haven v. Brown*, 22 Id. 208. Such evidence is admissible to correct mistakes: *McCurdy v. Breathitt*, 17 Id. 65, and cases there cited.

BATCHELDER v. SHAPLEIGH.

[10 MAINE, 135.]

MILL-SAW IS NOT A TOOL within the meaning of Stat. 1821, c. 95, and is not, therefore, exempt from execution.

TROVER for a mill-saw. Defendant levied on it by virtue of a writ of attachment against plaintiff, who claimed it as exempt from attachment because it was a "tool necessary for his trade or occupation." Ruggles, J., being of opinion that the saw was not exempt, directed a nonsuit.

N. D. Appleton, for the plaintiff, cited *Buckingham v. Billings*, 13 Mass. 88; *Gibson v. Tenney*, Id. 205; *Howard v. Williams*, 2 Pick. 80; *Daily v. May*, 5 Mass. 313.

Burleigh, for the defendant: *Buckingham v. Billings*, 13 Mass. 88; *Daily v. May*, 5 Id. 313; *Gale v. Ward*, 14 Id. 352 [7 Am. Dec. 223]; *Haskell v. Greely*, 3 Greenl. 425.

WESTON, J. We are satisfied that the mill-saw can not be regarded as a tool exempted from attachment under the statute. It is not an instrument worked by hand or by muscular power, but part of a mill propelled by water. The exemption under the statute can not be sustained to the extent claimed by the plaintiff.

Judgment affirmed.

"TOOLS" IN EXEMPTION LAWS.—See this subject considered at length in the note to *Kilburn v. Demming*, 21 Am. Dec. 545.

HOBART v. DODGE.

[10 MAINE, 156.]

WORDS INSERTED IN A WRITTEN CONTRACT, and then erased by drawing lines through them, may be referred to for the purpose of ascertaining the intent of the parties to the contract.

PROMISSORY NOTE payable "on demand, with interest after four months," with the words "on demand" erased by drawing lines through them, is not due until four months from the date thereof, and such erased words, being still legible, may be resorted to in determining that such was the intention of the parties.

ASSUMPSIT on the following promissory note: "Boston, November 25, 1831. For value received, I, the subscriber, of Saco, in the county of York, and state of Maine, promise to pay James T. Hobart or order ten hundred and thirty-two dollars fifty-one cents on demand, with interest after four months." The words "on demand" had three parallel lines drawn through them, but they still remained legible. This action was commenced January 14, 1832. Parris, J., ruled, *pro forma*, that the note, by its terms, was not due and payable at the time the action was commenced. Verdict for defendant.

J. and E. Shepley, for the plaintiff.

D. Goodenow and Fairfield, contra.

By Court, MELLETT, C. J. From an inspection of the original note at the argument of this cause, it appears to be a printed one, with proper blanks left for the insertion of the names of the promisor and promisee, place of abode, etc. The printed words "on demand" were erased by three parallel lines drawn across them, leaving the words, however, as legible as they were before the lines were drawn. The only question in the cause is, whether the note became due before the expiration of four months from its date. The counsel for the plaintiff contends that the limitation as to time applies only to the payment of interest, and that the principal was due presently or on demand. This construction is denied by the counsel for the defendant. The case presents two questions: 1. Whether the court are at liberty to draw any conclusions, as to the intention of the parties, from the obliteration of the words "on demand," in the manner above described. 2. If not, what is the true construction of the note, totally disregarding those words.

1. As to this point, the plaintiff's argument is, that as those words are now no part of the contract, the court can not receive any explanations from them any more than from any other parol

evidence; and that no parol evidence is admissible in the explanation of a plain, intelligible contract. This argument deserves careful consideration. The principle of law is clear that where a promise is unambiguous, the promisor can not, by parol proof, relieve himself from the obligation of it, by contradicting or explaining it. Nor can the promisee, in such a case, by the introduction of parol proof, subject the promisor to greater liabilities than the written promise has created. These principles appear to be settled. The erasure of the above-mentioned words was made for some purpose, and it is presented to the view of the court by the consent of both parties. The defendant signed the note, as must be presumed, after the obliteration was made; because, immediately following, is the limitation of four months, and gave it to the plaintiff in the same situation in which it now appears; and the plaintiff having so received it, has produced it in court as the basis of his claim, and we can not shut our eyes against it, even if we have no right to take judicial notice of it. We can not but see that the words "on demand" were obliterated by the consent of the parties. We admit that they are now no part of the contract declared on; but as both parties have placed the fact of erasure before us, have they not both consented that they might aid the court in the true construction of the words which constitute the contract? Do they not necessarily present a visible negative upon the idea that the defendant or plaintiff contemplated a liability to payment under four months? Suppose the words "on demand" had not been erased, but, instead of that, the word "not" had been interlined, so as to be read, "not on demand," the meaning would seem plain. Does not the erasure imply the same thing?

But we are not left without all light upon the subject. In the case of *Jones v. Fales*, 4 Mass. 245, we may find some aid upon the point before us. It was an action on four promissory notes, all negotiable. On one of the notes, made payable to Fales or order, near the corner the words "Foreign Bills" were written within brackets. Several points were made in the defense. In delivering his opinion, Parsons, C. J., says: "The next question is, whether these words thus written and placed, are a part of the promisor's contract. I do not think it material whether they were a part of the original contract, or added in explanation of it. For when the promisee took the note with these words on it, he was subject to the explanation in the memorandum, if it was one, as much as he would have been

bound by these words, if they were a part of the promise." Sedgwick, J., declared his concurrence in the opinion of the Chief Justice. Parker, J., says: "I consider those words as furnishing evidence of the understanding of the promisor and promisee" as to the mode of payment; but he said he was satisfied that the memorandum never was intended to check the transferable nature of the note. The spirit of the decision on the point above stated, seems to be applicable to the case before us. The principal difference is, that in one case, the meaning and intended effect of a memorandum, and in the other the meaning and intended effect of an erasure, was the subject of inquiry; neither being considered as a part of the note, on the face of which, by the consent of promisor and promisee, it appeared.

2. As to this point, we do not consider the case of *Loring v. Gurney* as applicable. In the case before us, we have no evidence of usage, either of a general character, or as existing in the plaintiff's store and mode of dealing in his business. In the whole sentence containing the defendant's promise there is no comma, which might lead to the conclusion whether the limitation of four months was intended to apply to the interest exclusively or to both; but the promise is to pay the specified sum with interest after four months. It is true that notes are often made payable on demand, with interest after a future day. In such cases it may be fairly presumed that no immediate payment is contemplated, and therefore the promise of interest after a future day is perfectly consistent. As the limitation as to time of payment by the terms of the note appears applicable to the whole promise, as well principal as interest, we do not feel at liberty to appropriate the limitation to the payment of the interest only.

We are of opinion that in either view of the subject, a good defense to the action is established.

Judgment on the verdict.

DONNELL v. THOMPSON.

[10 MAINE, 170.]

JUDGMENT IN AN ACTION FOR THE BREACH of a covenant against incumbrances in a deed is no bar to a subsequent action for the breach of a covenant of warranty in the same deed.

AN ACTION FOR BREACH OF A COVENANT of warranty may be maintained without showing an actual eviction by a paramount title. A yielding

up the possession to him who owns such paramount title, or purchasing that title, is sufficient.

WIDOW'S JUDGMENT FOR DOWER can not be impeached by her declarations.

ACTION to recover damages for breach of a covenant against incumbrances and a covenant of warranty, in a deed drawn in the usual form, by which the defendant conveyed to the plaintiff a certain farm in Buxton. On plaintiff's behalf it appeared that after the execution of the deed, one Esther Thompson commenced an action against plaintiff to recover her dower in the premises conveyed; and obtained judgment with damages and costs. No dower was ever assigned to Esther, plaintiff having compromised with her after the entry of judgment in her favor, and paid her one hundred and five dollars, for which she relinquished her claim of dower. On part of defendant it appeared, that after Esther commenced her suit against plaintiff, but before its compromise, the latter commenced an action against this defendant to recover damages for a breach of the covenant against incumbrances in the deed aforesaid, alleging as a breach the then existing right of Esther to dower in the land conveyed, and the commencement of the suit by her for the recovery thereof. That in such action the present plaintiff had recovered of the present defendant one dollar damages and thirty-nine dollars and thirty cents costs, which were satisfied by a levy upon defendant's real estate. This former recovery was pleaded in bar to the present action. It appeared that at the time the deed from plaintiff to defendant was executed, Esther's right of dower in the premises conveyed was discussed and admitted by both; and plaintiff declared that he would never call on the defendant on account of the old lady's share in the farm; and that, on several subsequent occasions, plaintiff had expressly recognized this agreement.

D. Goodenow, for the plaintiff. 1. The parol evidence was inadmissible: *Kimball v. Morrell*, 4 Greenl. 368; *Emery v. Chase*, 5 Id. 232; *Linscott v. Fernald*, Id. 496; *Richardson v. Field*, 6 Id. 37; *Hale v. Jewell*, 7 Id. 435 [22 Am. Dec. 212]. 2. The former recovery is not a bar: *Wyman v. Bullard*, 12 Mass. 304; *Outram v. Morewood*, 3 East, 346; *Emerson v. Proprietors*, 1 Mass. 464 [2 Am. Dec. 34]; *Hamilton v. Cutts*, 4 Mass. 349 [3 Am. Dec. 222]; *Sprague v. Baker*, 17 Mass. 586; *Stearns on Real Actions*, 247.

J. and E. Shepley and Elden, contra. This action can not be maintained on the covenant of warranty, because there has

been no eviction or ouster by paramount title: *Marston v. Hobbs*, 2 Mass. 437 [3 Am. Dec. 61]; *Bearce v. Jackson*, 4 Mass. 410; *Twambley v. Henley*, 4 Id. 442; *Prescott v. Trueman*, 4 Id. 631 [3 Am. Dec. 246]; *Hamilton v. Cutts*, 4 Mass. 352 [3 Am. Dec. 222]. The cases of *Chapel v. Bull*, 17 Mass. 213, and *Sprague v. Baker*, 17 Id. 586, are not opposed to these views. A recovery in a real action is not a breach, unless followed by an actual ouster: *Kerr v. Shaw*, 13 Johns. 236.

By Court, MELLE, C. J. The action on the covenant of freedom from incumbrances was prematurely brought, and nothing but nominal damages were recovered; still it is admitted that the judgment in that action would be a good bar to a second action on the same covenant, for the same breach. But it is contended that it is no bar to the present action, founded on the covenant of warranty, or covenant for quiet enjoyment. This action was not commenced until after the recovery by Esther Thompson of her dower and damages against the present plaintiff. But her dower was not actually assigned, because it was prevented by a compromise between the parties, by which the plaintiff extinguished her title by paying her one hundred and five dollars. The question for decision is, whether the present action is barred by the former judgment. It is very clear that the two covenants are different in their character. The covenant in the first action is a covenant *in præsenti*. That in the present case is a covenant *in futuro*, which runs with the land. The counsel for the defendant has contended that there is another marked distinction, and one of importance as applicable in the case before us, namely, that the covenant of freedom from incumbrances extends merely to those claims which others have on the lands, which lessen its value to the purchaser, but are not inconsistent with his legal title; as an easement, a mortgage, an outstanding lease, a right of dower, etc., but that the covenant of warranty extends to the whole title, and that no action can be maintained upon this covenant except in those cases where the plaintiff has lost his land, by eviction or ouster, by elder and better title. Such a warranty was at common law the foundation of a voucher by the tenant when impleaded, and if he lost the land, he might have judgment to recover of the warrantor other lands of equal value; but this course of proceeding is unknown with us.

In support of his position the counsel has cited several cases. In *Marston v. Hobbs* [3 Am. Dec. 61], certain general principles are laid down, not immediately bearing on the point. In *Bearce*

v. *Jackson*, the chief justice observes that to entitle a plaintiff to recover on the covenant of warranty, he must show an actual eviction or ouster by a paramount title. In *Twambley v. Henley*, the same principle is stated in nearly the same words; but in neither expressing, in terms, what was intended by a paramount title. In *Prescott v. Trueman* [3 Am. Dec. 246], the declaration was upon the covenant of freedom from incumbrances; at least, the question before the court arose upon a demurrer to a count upon that covenant; and the breach alleged was that the paramount title was in another person, at the time of Trueman's conveyance to the plaintiff. Parsons, C. J., in delivering the opinion of the court, after observing that an easement, a mortgage, or a claim of dower is an incumbrance, observes, "and for the same reason, a paramount right which may wholly defeat the plaintiff's title is an incumbrance. It is a weight on his land which must lessen the value of it. If it should appear to the jury who may inquire of the damages, that the plaintiff has, at a just and reasonable price, extinguished his title, so that it can never afterwards prejudice the grantor, they will consider this price as the measure of damages." Now this last case only decides that, in an action founded on the covenant of freedom from incumbrances, the plaintiff may recover damages for the loss of the land; or what amounts to the same thing, a sum of money equal to the value of the land which he would have lost forever, had he not paid the sum to extinguish the paramount title; yet an action on the warranty, we apprehend, would also be proper in such case for the recovery of damages, as was decided in the case of *Hamilton v. Cutts* [3 Am. Dec. 222], cited by the counsel for the plaintiff. There no actual eviction by process of law had taken place, nor any ouster, because the dispossession was by consent of the plaintiff while he was tenant in possession; but in that case he submitted to a paramount title; and the court observed, that there was no necessity for him to involve himself in a lawsuit to defend himself against a title which he was satisfied must prevail. There seems to be no difference in principle between yielding up the possession to him who owns the paramount title, and fairly purchasing that title, so far as respects the right to recover damages on the warranty.

In the two preceding cases above cited, viz., *Bearce v. Jackson*, and *Twambley v. Henley*, it was stated that an action could not be sustained on the covenant of warranty, unless there had been an eviction or ouster by a paramount title; but still the

general position thus stated is to be considered as qualified by the doctrine previously established in *Hamilton v. Cutts*.

Thus it is seen that none of the cases cited by the counsel for the defendant go the length of proving the principle to be correct, that an action on the covenant of warranty can in no case be maintained, except where there is a loss of the land warranted by an elder and better title. A different principle is established in the case of *Sprague v. Baker*, 17 Mass. 586. It was an action of covenant broken, upon a deed, containing the usual covenants against incumbrances, of warranty, etc. White and wife mortgaged the premises to Morse and Bachelder, and afterwards conveyed the same to Baker, the defendant; he conveyed the same to Hitchings, with warranty, and the usual covenants of seisin, of good right to convey, and against incumbrances; and Hitchings conveyed the same to Sprague, the plaintiff, with similar covenants. It was objected that the plaintiff, being an assignee of Hitchings, could maintain no action against Baker, on the covenant against incumbrances made by him, as that covenant was broken as soon as it was made, and was one which did not pass with the land to the plaintiff. The court gave no definite opinion as to the soundness of the above objection, the chief justice saying, "as we have no doubt that the plaintiff is entitled to judgment upon the other covenant" (the covenant of warranty). "The words of the covenant are to warrant and defend (the premises) against 'the lawful claims of all persons;' and it is agreed that before and at the time of the grant to Hitchings, there was a claim on the land by way of mortgage; that after the assignment the mortgagee demanded possession of the plaintiff, or the payment of the debt due on the mortgage, and that he, to avoid a suit with which he was threatened, and against which he could not defend himself, paid the sum due on the mortgage. Against this claim, therefore, Baker has not defended him, according to the express words of the covenant. If the plaintiff had formally yielded possession, and immediately after had extinguished or purchased in the mortgage, he might have recovered against the defendant on the authority of *Hamilton v. Cutts et al.* [3 Am. Dec. 222]. There is nothing to distinguish the two cases but a point of form, which does not affect the merits of the question." And we may add that the case before us differs only in a point of form from *Hamilton v. Cutts*, and *Sprague v. Baker*. This last case appears to have been decided by a full bench, and it is, in our judgment, a decisive authority in favor of the plaintiff

The language of the covenant in Baker's deed to Hitchings is the same as in the deed of Thompson to the plaintiff. Such being our opinion on the main question, the objection made to the admission of certain parol evidence on the part of the defendant becomes of no importance to the plaintiff, as we do not consider the facts thus proved of such a character as to influence the court in their decision. The widow's judgment for her dower is not to be impeached or affected by her declarations or any of the facts proved by parol.

We are all of opinion that the action is well maintained on the covenant of warranty; and, according to the agreement of the parties, judgment must be entered for the plaintiff for one hundred and five dollars damages, eleven dollars and fifty cents costs of reference, and costs of court.

EVICTIOIN NECESSARY TO MAINTAIN ACTION for breach of covenant of warranty: *Ferriss v. Harshea*, 17 Am. Dec. 782, note 788; *Fitzhugh v. Croghan*, 19 Id. 140. See *King v. Kerr's Adm'rs*, 22 Id. 777.

PAYNE ET UX. v. PARKER.

[10 MAINE, 178.]

A MARRIED WOMAN CAN ONLY CONVEY an estate in lands belonging to her, by joining in a deed with her husband, and by the use of proper terms of conveyance to effectuate the object in view.

SIGNING AND SEALING A DEED is insufficient to convey her estate, unless she is named in the deed as a party to the conveyance.

CONVEYANCE BY A HUSBAND of a freehold estate, of which he is seised in the right of his wife, operates by way of estoppel to convey to the grantee the title during his life.

DEED BY A HUSBAND OF AN ESTATE of which he is seised in the right of his wife, by which he conveys all the right, title, and interest of his wife, Eliza, therein, "except the right to her mother's thirds, which I reserve a right to claim at the decease of the mother of said Eliza," was held to except the reversion of the dower of his wife's mother, and not the dower itself, and that no dower having been assigned by metes and bounds, the grantee took, by his deed, an undivided two-thirds of the estate in common.

Writ of entry for an undivided one-third of a lot of land in Buxton. At the trial it appeared that the defendant Eliza Ann Payne, formerly Butterfield, was sole heir of Samuel Butterfield, who, it was admitted, was at the time of his death the owner in fee of the land described in plaintiffs' writ. The tenant relied upon a deed to him by demandants, executed on the twenty-fourth of June, 1829, subsequent to the death of Samuel But-

terfield. In this deed the wife did not appear as a party, although she signed and sealed it. The description in the deed was as follows: "A certain piece of land situated in Buxton, in the state of Maine, and county of York, being that part of the 22d lot on letter C, in the third division of lots in said Buxton, being the same which Boaz Rich, of Standish, conveyed by deed to Samuel Butterfield, since deceased; this having particular reference to said Rich's deed for boundaries and extent; meaning to convey all the right and interest which Eliza Ann Butterfield, daughter of said deceased, now my wife, Eliza Ann Payne, has or ever had in said land, and all right to said deceased's estate, both real and personal; except the right to her mother's thirds, which I reserve a right to claim at the decease of the mother of said Eliza." Seventeen years prior to this conveyance, Parker, the defendant, married the widow of Butterfield and moved on the farm, of which the demanded premises constitute a part. After the death of Parker's wife, Payne entered upon the demanded premises in the right of his wife. No dower was ever assigned to the widow of Butterfield. If in the opinion of the court the plaintiffs were entitled to recover, the tenant was to be defaulted, otherwise plaintiffs were to be nonsuited.

J. and E. Shepley, for the defendants. The reservation, or part excepted in this deed, is so uncertain and indefinite that it can never be located, and is therefore void: *Jackson v. Hudson*, 3 Johns. 375; *Jackson v. Gardner*, 8 Id. 394. If, however, the construction of the deed should be that one third in common is reserved, then it is contended that the exception is void, on the ground of its repugnancy to the grant: Com. Dig. F. E. 5, Exception; *Culler v. Tufts*, 3 Pick. 272; *Sprague v. Snow*, 4 Id. 54.

D. Goodenow, contra, cited *Allen v. Crosby*, 6 Greenl. 453, *Fairbanks v. Williamson*, 7 Id. 96.

By Court, MELLE, C. J. The deed on which the tenant relies is drawn very inartificially, and considering the circumstances in which the grantor stood in respect to the property therein described, it presents to the eye of a lawyer a confusion of ideas, and no little ignorance of legal principles. Hence, the true construction of the deed is not unattended with some difficulties. Still, the real intention of the parties to the transaction, we apprehend, may be easily understood. As the wife of Payne signed the deed with her husband, she then owning the

fee of the estate described, it was doubtless considered as an effectual conveyance of all the right and title thereto which she then had, or ever had, except her reversionary interest and estate in that portion of the land described, which should be assigned to her mother, as her dower, she being the widow of Samuel Butterfield, the former owner, from whom all the property descended to Mrs. Payne, his only child and heir. Or, to speak in common and familiar language, the object was not to convey, but to except the reversion of the widow's dower. The questions are, whether the intention of the parties can be legally carried into effect; and if it can, then in what manner, consistently with legal principles.

It is very clear that though Mrs. Payne signed and sealed the deed, she did not join as a party to the conveyance, and she does not appear as a grantor in any part of the deed. The only way in which a married woman can convey an estate belonging to her is, by joining with her husband in a deed of conveyance, and by the use of proper terms of conveyance, effecting the object in view. Her fee-simple estate, therefore, was not conveyed by the deed before us in any part or portion of the lands therein described: *Lithgow v. Kavenagh*, 9 Mass. 161. But as Payne, the husband, was in virtue of the marriage seised of a freehold estate, in right of his wife, in the lands described in the deed, the same operated, notwithstanding the clumsy manner in which it was drawn, by way of estoppel to convey to the tenant all the right and title as to every part and portion of the premises described, and not legally excepted. What will be the rights of the wife or her heirs after the death of Payne, is a question as to which we are not called upon to intimate any opinion.

Our next inquiry is, whether the exception in the deed is a good one. It is contended by the counsel for the tenant, that it is perfectly void on the ground of repugnancy to the grant that precedes it.

We have already stated what must have been the meaning of the grantor in the blundering language of the exception, "except the right to her mother's thirds, which I reserve a right to claim at the decease of the mother of said Eliza." A literal construction would render the exception the merest absurdity. The grantor had no right to the "mother's thirds," and there could be none for him to claim at her decease. The true construction must be what the parties fairly intended, the reversion of her dower. Indeed, the counsel have adopted this con-

struction in the argument. "An exception is ever a part of the thing granted and of a thing *in esse*, as an acre out of a manor:" 1 Inst. 47. "If a man makes a grant, he may make an exception out of the generality of the grant; but an exception of a thing certain out of a thing particular, is void; as if a man leases twenty acres, excepting one acre:" Com. Dig. F. E. 5, Exception. The land in the deed is described thus: "being that part of the twenty-second lot on letter C, in the third division of lots, in said Buxton; being the same which Boaz Rich of Standish conveyed by deed to Samuel Butterfield, since deceased, this having particular reference to said Rich's deed for boundaries and extent; meaning to convey all the right and interest which Eliza Ann Butterfield, daughter of said deceased, now my wife, Eliza Ann Payne, has or ever had in said land, and all my right to said deceased's estate, both real and personal, except," etc.

We are not furnished with a copy of the deed referred to, nor do we know how the land is described, or the number of acres. The only facts we know are, that the land conveyed is a part of lot number 22, in a certain division and town, and purchased of Rich. According to the above definition of a good exception, how can we pronounce the exception as repugnant to the grant; as "a thing certain out of a thing particular"? The description in the deed, as presented to our view, is more general than particular; it is a grant of all the wife's interest and estate which descended to her from her father. In the case of *Cutler v. Tufts*, cited and relied upon by the counsel for the tenant, there was a palpable repugnancy. The grant was of an undivided moiety, and by reference to another deed the moiety was reduced to one fourth part. Viewing the deed in that light, the court said, that by reason, as well as according to authorities, the latter clause ought to be rejected as repugnant and void. But that case was different from the present in most of its particulars. In the above case the court speak of the rule laid down by Coke as merely technical, which ought not to be acted upon but in the last resort, as it might force upon the court a construction different from the intent of the parties. We apprehend, also, that the ancient principle or rule of construction as to exceptions in deeds of conveyance, is applied at the present day with less strictness and severity than formerly, so as better to carry into effect the manifest intention of the parties.

On the whole, we do not perceive in this case any principle

of law, or rule of construction, which requires us to pronounce the exception in the deed we are examining, as repugnant and void. What, then, are the effect and operation of the exception? At the time the deed was executed, the land was subject to the right of dower of the widow of Samuel Butterfield, but no dower had then been assigned; and no one could decide in what part of the premises it would be assigned; and for that obvious reason it was impossible for the grantor to except the reversionary interest of his wife by metes and bounds, and as the excepted interest or estate could not be described by metes and bounds, but was necessarily excepted as an interest or estate in common, for the same reason that part or portion of the land which was not excepted, but conveyed, was necessarily conveyed in common; that is, two thirds of the land were conveyed in common, and holden in common, with the reversion of the widow's dower in the other third, excepted and belonging to Mrs. Payne. Such was the nature of the estate conveyed and the estate excepted; and the tenancy in common was to continue, for the reason we have given, until an assignment of the widow's dower should operate to produce a severance of the estate in common; but as there never was any assignment of dower to Mrs. Butterfield, the consequence is that the property is still holden in common and has been ever since the deed of conveyance was made.

It was urged in the argument, that if there had been an assignment of dower, perhaps the part assigned might not have been one quarter of the land or farm, measured by acres; and yet in the present action one undivided third part is demanded; and for this reason, it has been contended, that such a construction of the exception as we have given can not be the correct one. It is very doubtful whether such an objection could be sustained in any case; the grantee must be considered as knowing the legal consequences which may follow where such an exception is contained in the deed, and as assenting to those consequences in their application to himself. In the case before us, however, there are no facts which could lead us to the conclusion that less than one third of the land described in the deed would have been assigned to the widow as her dower, if any had been assigned.

From a view of all the peculiar facts of this case, and the application to them of legal principles, as we understand and believe they must be applied, we are all of opinion that the action is well maintained. A default must be entered, and judgment thereon for the demandants.

DEED, WHEN BINDING UPON A PERSON NOT NAMED AS A PARTY THERETO.—Considerable difference of opinion exists in the United States upon the question as to whether a person who signs and seals a deed, but who is not mentioned in the deed, and does not otherwise appear as a party thereto, is bound thereby. In Maine, following the principal case, such a person is held not bound by the deed: *Stevens v. Owen*, 25 Me. 94; *Lothrop v. Foster*, 51 Id. 367; *Peabody v. Hewett*, 52 Id. 33. See *Frost v. Deering*, 21 Id. (8 Shepl.) 156. In Massachusetts it was decided, at an early date, that "a deed can not bind a party sealing it, unless it contains words expressive of an intention to be bound:" *Catlin v. Ware*, 9 Mass. 218; S. C., 6 Am. Dec. 56; followed upon this point, with approval, in *Leavitt v. Lamprey*, 13 Pick. 382; S. C., 23 Am. Dec. 685; *Harper v. Gilbert*, 5 Cush. 418; *Hubbard v. Knous*, 3 Gray, 367; *Greenough v. Turner*, 11 Id. 334; *Wildes v. Van Voorhis*, 15 Id. 144. See, to the same effect, *Luskin v. Curtis*, 13 Mass. 223; *Bruce v. Wood*, 1 Metc. 542. A similar rule prevails in Indiana: *Cox v. Wells*, 7 Blackf. 410. Also in Maryland and Alabama: *Hutchings v. Talbot*, 3 Har. & J. 378; *Harrison v. Simons*, 55 Ala. 510. In the latter case, Manning, J., said: "The persons named in the deed as grantors, by signing and sealing it, declare and make known to all whom it may concern that they respectively grant, bargain, enfeoff, and convey the land therein described to Thomas J. Harrison; and that they covenant with him that they are seised in fee, and have a right to sell and convey the land, and that they will warrant and defend the title. But what is declared or certified by the signature and seal of A. L. Barnett? Can they import anything else than is contained in the deed, to wit, that the persons described in it as grantors, convey and covenant as above? It is not set forth in the deed that A. L. Barnett himself does, or shall do, any of these things; and we can not attribute any efficacy or meaning to his mere signature and seal apart or different from what is expressed in the instrument to which they are affixed. * * * The deed in the cause pending before us can therefore operate only to convey the title that was in the persons who are the grantors in the deed, and not the title of A. L. Barnett." In the supreme court of the United States, the same rule has been adopted: *Agricultural Bank v. Rice*, 4 How. 225. In the latter case, property belonging to married women had been bargained to purchasers by an executory contract, signed and sealed by the husbands and wives jointly, and describing them all as parties to it; but the deed subsequently executed set forth that the husbands, in right of their wives, conveyed the property, in consideration of forty thousand dollars, to the grantees. This deed was signed and sealed by the husbands and wives jointly; and they all acknowledged, the wives separate and apart from their husbands, that they signed, sealed, and delivered it as their act and deed. Taney, C. J., in delivering the opinion of the court, thus referred to that deed: "It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee; and merely signing and sealing an instrument, in which another person is grantor, is insufficient." See also to the same effect, *Powell v. M. & B. Mfg Co.*, 3 Mason, 347; *Hall v. Savage*, 4 Id. 273; *Lane v. Dolick*, 6 McLean, 200, 203; and *Purcell v. Goshorn*, 17 Ohio, 105.

A contrary rule has been adopted and followed in New Hampshire: *Elliot v. Sleeper*, 2 N. H. 525; *Burge v. Smith*, 27 Id. 332; *Woodward v. Seaver*, 38 Id. 29. See *Gordon v. Haywood*, 2 Id. 402. In *Woodward v. Seaver*, *supra*, Perley, C. J., states the rule adopted in that state: "In this case, Hannah L. Woodward owned the land, and in order to convey her right it was necessary that her husband should join with her in the conveyance; her separate deed

would be void, and convey no title. The husband's name does not appear in the body of the deed, but there is a clause purporting to release Hannah I. Woodward's right of dower, and all her other rights in the premises, in which she is described as the wife of the grantor. It therefore appears on the face of the deed that she was a married woman, and, consequently, that to give her conveyance effect, it was necessary her husband should join in the deed. This would seem to bring the present case very distinctly within the authority of *Elliot v. Sleeper*, 2 N. H. 525. In that case, as in this, the land belonged to the wife; the deed purported to be her sole conveyance, but was signed and sealed by her and her husband, and she is described as being the wife of Nathaniel Brown, who signed and sealed the deed. From this the court say it appears that it was necessary he should join with her in the conveyance. So it appears from the deed in the present case, that Hannah I. Woodward was a married woman, and that to make her deed operative it was necessary her husband should join in the conveyance.

"It has been lately decided, in *Burge v. Smith*, 27 N. H. 332, that where the wife signs and seals the deed of the husband, it is sufficient to bar her claim of dower, though no mention is made of her in the body of the deed, which is in some respects stronger than the present case, for the husband's deed is operative upon his own estate without the wife's joining; but here the deed would be wholly void, unless it should be held that signing and sealing the deed made him a party to the conveyance. There is also less danger that the husband, who is in law *sui juris*, should part with his rights improvidently, than in case of the wife, whom the law supposes to be incapable of acting for herself."

In Mississippi the only thing necessary to make a deed binding upon a party is that he shall execute it in such a manner as to show that he intended to be bound thereby. In *Armstrong v. Stovall*, 26 Miss. 275, it was adjudged that a deed was binding upon a man and his wife where it appeared that the latter signed the deed in which she alone was named as the granting party, and that immediately after her signature the husband signed the following:

"I, Edmond Jenkins, husband of the said Mary Jenkins, do hereby consent to the above obligation of my wife. Witness my hand and seal, this tenth day of February, 1846. EDMOND JENKINS. [SEAL.]"

This case was approved in *Stone v. Montgomery*, 35 Id. (6 George) 107, where it was determined, under a statute requiring a husband to join in a deed with his wife to enable her to convey her estate, that his signing and acknowledging a deed in which she alone was named as the conveying party was a sufficient compliance with the statute, and that he would be estopped from setting up any claim to the property conveyed as against the grantee.

In *Mead v. Billings*, 10 Johns. 99, a person who signed an indenture of apprenticeship, but who was not named therein as a party, was held bound thereby.

In California a rule similar to that adopted in Mississippi is in force: *Ingoldsby v. Juan*, 12 Cal. 564; *Dentzel v. Waldie*, 30 Id. 138. In the former case a deed was declared sufficient to convey the separate property of the wife, under an act which provided that "no sale or other alienation of any part of such property can be made, * * * unless by an instrument in writing, signed by the husband and wife," in which the wife was named as the conveying party, and which was signed by her, and at the end of which the husband, without being named in the body of the deed, signed the fol-

lowing: "I have read the foregoing, and fully agree with the conveyance made by my wife. Lewis Depeaux."

Dentzel v. Waldie, 30 Cal. 138, shows that it is not necessary that the husband of a married woman should be named as a grantor in the body of the deed, to enable his wife to convey her separate estate, but that it is sufficient if he sign, seal, and acknowledge it. When the latter case was decided, the statute provided that "a husband and wife may by their joint deed convey the real estate of the wife," etc. Signing his name at the end of the deed was considered sufficient to make it his deed within the meaning of that statute.

HATHORN v. STINSON.

[10 MAINE, 224.]

COURT SHOULD CHARGE THE JURY upon the law applicable to the facts proved, and not answer abstract questions not arising in the case.

GRANT OF A THING IMPLIES A RIGHT to all the means of enjoying it of which the grantor was possessed.

WHERE ONE BEING THE OWNER OF A MILL AND DAM, and also of land above flowed by such dam, sells the mill with all its privileges and appurtenances, he can not afterward compel the grantee to remunerate him for the injury caused by such flowing.

SUCH GRANTEE WOULD HAVE THE RIGHT to continue such dam so as to raise the same head of water as the grantor had been accustomed to raise before the grant.

WHERE THE OWNER OF LAND TO WHICH AN EASEMENT IS ATTACHED becomes the owner of the land upon which the easement is a burden, it is thereby extinguished, and a subsequent sale of the servient tenement passes the land unburdened with such easement, unless it is expressly reserved in the conveyance.

LIABILITY OF A PERSON FOR THE FLOWING OF WATER from his land upon an adjoining tract is absolutely extinguished by such person acquiring the title to such adjoining tract, and upon the latter being subsequently conveyed, the right to compensation for such flowing does not revive.

WHETHER A LICENSE CAN BE PRESUMED from the flowing of lands for the support of mills, no matter for how long such flowing may have continued, *quære*.

COMPLAINT under stat. 1821, c. 45, for flowing the complainant's land. Plaintiff, to establish his title to lot No. 49 in the town of Woolwich, which was the land flowed, introduced a deed from Jonathan Eames, jun., to John Hathorn, dated October 20, 1777, and then deraigned title through sundry mesne conveyances from the latter to himself. This lot was situated on Nequassett pond, and the mills of defendants stood on a stream issuing from this pond, on a lot below and adjoining lot No. 49. It was admitted that the lot where the mills were situated, and also lot No. 49, were once owned by a proprietary in common and undivided. Plaintiff introduced several witnesses, who tes-

tified that they had known the land flowed for a number of years. That there had been a dam and mills where defendants' now stand as long ago as they could remember. That the plaintiff's land was low and had always been overflowed. Defendants introduced a vote passed at a proprietors' meeting, August 27, 1776, authorizing Cadwallader Ford, and such as might join, to erect a saw-mill upon the interest of the proprietary. Also a vote at a meeting held June 11, 1754, granting to Joseph Paine, defendants' grantor, "ten rods square of land adjoining to his grist-mill there, for a house lot, to be as far above as below ye said mill." Also a special act of the legislature, passed January 24, 1828, entitled an act authorizing the owners of the falls and mill privileges on Neguassett falls to erect a dam thereon. The defendants' counsel requested the court to instruct the jury:

1. That if, while the proprietors were owners in common of the land where the dam, mills, and pond are situated, and the lands adjoining the same, including what is now lot No. 49, they, in order to raise a head of water to propel mills, erected, or authorized and caused to be erected, a dam, and subsequently granted and conveyed the dam and mills and land under the same, with the privileges and appurtenances thereto belonging, and after that granted and conveyed said lot No. 49, the grantees of the latter took and held it subject to the right of the owners of the dam and mills to keep up the same and flow the water as it had been previous to the grant or conveyance of the dam and mills by the proprietors, without any claim for a payment of damages. 2. That if the same facts existed as supposed in the first request (with the exception that the proprietors granted and conveyed No. 49 before they conveyed the dam, mills, and land under them, and privileges and appurtenances), in such case, the grantee of No. 49 took and held it without any right to claim damages for flowing the water as it had been before the conveyance of No. 49. 3. That if the dam and mills and land and No. 49 were owned by the same person or persons, and such owners conveyed the dam and mills and land and privileges and appurtenances, and afterwards conveyed No. 49, the grantee of No. 49 would have no right to claim damages for keeping up the water by the dam as it had been before the conveyance of No. 49. 4. That if the same facts existed as supposed in the third request (with the exception that the conveyance of No. 49 was before the conveyance of the dam, etc.), the grantee of No. 49 would have no right to claim dam-

ages for the continuance of the dam and pond, as they were before the conveyance of No. 49. 5. That if the same facts existed as supposed in the third and fourth requests (with the exception that the same person was owner of a part in common instead of the whole), and conveyances were after made, the grantee of No. 49 would have no right to damages for said flowing as aforesaid. 6. That lot No. 49, being by the plan bounded by the edge of the pond, extends only to the margin of the pond, and does not embrace any land under water, when the pond is no higher than it was when lot No. 49 was created by survey and plan. 7. That lot No. 49 being, by the original plan by which it was created, bounded by the margin of the pond, the owner of No. 49 can claim no damages for the pond being kept up to the height it was when lot No. 49 was created by the survey and plan.

The court refused to so instruct the jury, and instructed them as follows: 1. That where the same person is owner of a mill-dam, and also of a tract or parcel of land which is overflowed by water, raised, and thrown back upon it, by means of such dam, if he should sell and convey to A. B. the parcel flowed, reserving to himself, his heirs and assigns, the right to continue such dam and flowing without payment of damages, in such case neither A. B., nor his heirs nor assigns, could maintain a complaint under our statute against the grantor of A. B., his heirs or assigns; but if no such right is reserved in the deed to A. B., then, though he purchases the land, subject to the right which the statute gives the grantor to continue the dam and the flowing, yet he purchases it also with the right to recover damages for such flowing, which our statute in express terms gives to the owner of the land, whoever he may be. That the liability to damages and the right to recover compensation are inseparable, unless separated by contract. That when in the course of conveyance, devise, or descent, the same person is for a time an owner, both in the dam which causes the flowing and in the land flowed, the right to recover compensation is suspended only during such ownership, in both the dam and the land injured. The court called the attention of the jury to the evidence relating to the time when lot No. 49 was drawn and became property in severalty. The jury answered that the lands of the proprietors were divided in 1740. The jury also certified that the mill mentioned in the deed of Hutchinson *et al.* to Savage, dated February 26, 1734, was not built by or under the authority of the proprietors, and that Paine's

mill was not built by or under their authority before the division in 1740. The court also instructed the jury, that as lot No. 49 was bounded on the river, it extended to the thread of the river, whether in its natural width or as raised and widened by means of the mill-dam. That as every man had a right to erect a mill-dam on his own land and flow the land of his neighbor, no grant or license from the owner of the land flowed could be presumed from the lapse of time, or at least for the length of time proved in the present. The jury also certified that the mill-dam had not been raised higher than it formerly was. Verdict for plaintiff, which was to be set aside and a new trial granted, if the instructions refused were correct or those given were incorrect. The other facts necessary for an understanding of this case are stated in the opinion.

Allen and Sprague, for the defendants.

Mitchell, for the plaintiff.

By Court, PARRIS, J. As the jury have found that the lands of the proprietors were divided in 1740, and that no mill had previously been erected by them, or under their authority, there were no facts in the case justifying the first and second requests of the defendants' counsel. The court are to charge the jury upon the law applicable only to the facts proved, but are not bound to answer abstract questions not arising in the case on trial. If the mills had been erected by the proprietors previous to the division of their common property, so that the mill site and land flowed had not at that time become the separate property of any individual, the request of the defendants' counsel would have been pertinent, and it would have been the duty of the court to have given the law arising from those facts, to the jury.

The third request is, "that the court would charge, that if the dam, and mills and land, and No. 49, were owned by the same person or persons, and such owners conveyed the dam, and mills, and land and privileges and appurtenances, and afterwards conveyed No. 49, the grantee of No. 49 would have no right to claim damages for keeping up the water by the dam, as it had been before the conveyance of No. 49." The facts are, that the mills stand on a stream running southwardly or south-westwardly from Neguassett pond in the town of Woolwich; that lot No. 49, which is now owned by the complainant, and on which he alleges the injury to have accrued by the flowing, is bounded eastwardly by the pond, or includes a part of the

pond; that the mill stands below No. 49 on the adjoining lot, and that this mill site was occupied as such, in 1734, and has been so occupied ever since, and that the mill dam has not been raised higher than it was formerly. The respondent offered proof tending to show that, upwards of fifty years ago, the mill site, mill, and privilege, and lot No. 49, were owned by the same person, and that such person conveyed the dam and mill, and land and privileges and appurtenances, still retaining No. 49, and that he afterwards conveyed No. 49 to a different grantee. Upon this proof, the respondent moved for the instructions contained in his third request. If these instructions were properly withheld, or if they were substantially given, there is no ground for disturbing the verdict on this point. Were they properly withheld?

What would pass by the terms dam, mills, privileges, and appurtenances? It is a principle of law, that where a thing is granted, the grant implies a right to all the means of enjoying it, so far as the grantor was possessed of those means: 1 Saund. 322, 323. The use of any thing being granted, all is granted necessary to enjoy such use; and in the grant of a thing, what is necessary for the obtaining thereof is included: Co. Lit. 56. Where the principal thing is granted, the incident shall pass: Id. 152; Com. Dig. Grant E. 9. In the construction of a grant, the court will take into consideration, the object which the parties had in view, and the nature of the subject-matter of the grant.

From the proof reported in the case, it appears that the meadow, now owned by the complainant, has been flowed ever since the first mills were erected on the site where the respondent's mill now stands, which was probably more than one hundred years ago; that the oldest witness examined, who could recollect seventy-three years ago, knew that at that time there was a dam there high enough to raise a sufficient head of water to carry two saw-mills and a grist-mill well, and that the dam has always been high enough to flow the meadow owned by the complainant; that the meadow was flat and low, and always flowed, and that a dam thirty inches in height would flow it. This has been the situation of the mill and dam ever since the site was first occupied, and of course it was thus when it belonged to the same person who owned the meadow flowed, being part of No. 49. While in his possession, the dam was kept up to the same height as it now is, and consequently the meadow must have been flowed as it now is. He, being the

owner of the meadow as well as the dam, had a right to flow without being answerable for damages.

The mill could be of no use without a head of water sufficient for its operation, and that head could not be supplied without continuing such a dam as would cause the meadow to be overflowed. It was indispensably necessary to the enjoyment of the principal thing granted, and if, at the time of the conveyance of the mill and its privileges and appurtenances, the grantor was the owner of all the land flowed, we think, that both upon principle and authority, the grantee acquired a right to continue the dam so as to raise the same head of water as the grantor had been accustomed to raise previous to the grant, provided that was necessary for the useful operation of the mill. In *Blaine's Lessee v. Chambers*, 1 Serg. & R. 169, the court decided that a devise of "a grist-mill and appurtenances" carried with it what was actually used as an appurtenant by the testator in his life-time; and Yeates, J., said: "By these words, everything necessary for the full and free enjoyment of the grist-mill, and requisite for the support of the establishment, such as a dam, water, the race leading to the mill, a proper portion of ground before the mill for the unloading and loading of wagons, horses, etc., as used by the testator, would pass, for without these appurtenances the grist-mill could not be worked." In *Pickering v. Stapler*, 5 Serg. & R. 107 [9 Am. Dec. 336], Chief Justice Tilghman says: "The water right was appurtenant to the mill, and passed by the word appurtenances. This," says he, "appears so plain, that he who denies it should show the authority on which he rests his opinion. No such authority has been shown, but on the part of the defendant, cases were produced, showing that privileges of the kind in question pass by the name of appurtenances."

In *Leonard v. White*, 7 Mass. 6 [5 Am. Dec. 19], the question was, whether under a grant of a mill with all the privileges and appurtenances thereto belonging, the soil of a way passed, which had been immemorially used for the purpose of access to the mill from the highway. The court held that the soil did not pass, but that the way, as an easement, might be appendant or appurtenant to the mill. In *Blake v. Clark*, 6 Greenl. 436, the court go farther, and decide that the term "mill" may embrace the free use of the head of water existing at the time of the conveyance, as also a right of way or any other easement, which has been used with the mill, and which is

necessary for its enjoyment. In *Taylor v. Hampton*, 4 McCord, 96 [17 Am. Dec. 710], the question now under consideration seems to have been considered as settled, that the pond is an appurtenance of the mill, and the purchaser has a right to keep up the water to the height to which it was raised at the time he purchased, even though the consequences were the overflowing of the grantor's land. That was a case of very considerable magnitude, and was argued by some of the most able counsel in the state, yet although the question we are now considering was involved, and was of vital importance to the plaintiff, it was not even taken by the counsel, and the court assumed it as settled, and as the starting-point in their examination of the case. *Oakley v. Stanley*, 5 Wend. 523, was precisely like the case before us. In that it was decided, that the right to overflow adjoining premises of a grantor, to the extent necessary for the profitable employment of a water privilege conveyed, in the manner in which it existed and had been used previous to the grant, passes to the grantee as necessarily appurtenant to the premises conveyed. The court say, there can be no question but the grantee acquired an absolute right to maintain the dam at the height at which it was when he purchased from the grantor, and that he or his grantees are not responsible to the grantor or those who hold under him for any injury which the adjoining premises may receive from an overflow of water produced by the dam. In *Strickler v. Todd*, 10 Serg. & R. 63 [13 Am. Dec. 649], it was decided, that by conveyance of a mill, the whole right of water enjoyed by the grantor, as necessary to its use, passes along with it as a necessary incident; and the grantor can not, by the conveyance of another lot of ground through which the stream passes, impair the right to the use of the water already vested in the first grantee. It is unnecessary to extend this opinion by giving a summary of other corroborating cases. We will merely refer to *Whitney v. Olney*, 3 Mason, 280; *Wetmore v. White*, 2 Cai. Cas. in Err. 87 [2 Am. Dec. 323]; *New Ipswich Factory v. Batchelder*, 3 N. H. 190 [14 Am. Dec. 346]; *Jackson v. Vermilyea*, 6 Cow. 677; *Nicholas v. Chamberlain*, Cro. Jac. 121; and *Swansborough v. Coventry*, 9 Bing. 305.

From the view we have taken of this part of the case, we are of opinion that the instruction was properly requested. Our next inquiry is, was it substantially given? The first instruction given was, "that where the same person is owner of a mill-dam and also of a tract or parcel of land, which is overflowed by

water, raised and thrown back upon it by means of such dam, if he should sell and convey to A. B. the parcel flowed, reserving to himself, his heirs and assigns, the right to continue such dam and flowing without payment of damages, in such case neither A. B., nor his heirs or assigns, could maintain a complaint under our statute against the grantor of A. B., his heirs or assigns." Of the correctness of this instruction there can be no doubt. The statement of facts upon which it was given, supposes an express reservation to the grantor, of the right to flow, in which case the grantee would clearly have no right to compensation for injury occasioned by the flowing. The charge proceeds, "but if no such right is reserved in the deed to A. B., then, though he purchases the land subject to the right which the statute gives the grantor to continue the dam and the flowing, yet he purchases it also with the right to recover damages for such flowing." We are not disposed to question the correctness of this part of the charge, but it is predicated on a different state of facts from those supposed in the request under consideration, and which the defendant contends he had proved. The facts assumed in the charge are, that the grantor conveyed the premises flowed, but retained the mill and dam; the facts claimed to have been proved, and on which the instruction was requested, are, that the grantor conveyed the mill, dam, privileges, and appurtenances, but retained a portion of the tract flowed. In the latter case, we think the right to keep the dam to the same height it was continued by the grantor, and of course, to flow as much of his land as he was accustomed to flow, passed as an incident to the mill, necessary for its useful enjoyment, and that the grantee acquired an easement in so much of the grantor's land as would be flowed by continuing the head of water at the mill at its usual height. But the grantor's rights in the former case would depend upon a very different principle, which it is not necessary should be discussed or decided at the present time, as the facts proved do not require it.

The charge proceeds, "that where, in the course of conveying, devise, or descent, the same person is, for a time, an owner, both in the dam which causes the flowing and in the land flowed, the right to recover compensation is suspended only during such ownership in both the dam and the land injured." We think in such a case the right to recover compensation is entirely extinguished, and that the owner may, by conveyance, again separate the title, without receiving the

right to recover compensation. He may do it by express reservation, as is contemplated in the first branch of the charge in this case; or he may do it as the defendant contends was done in this case, by conveying the mill, etc., and the right to flow would follow as an easement, and consequently the right to recover compensation would not be revived. Or, if he so conveyed as to entitle the purchaser of the lot flowed to compensation for the injury sustained by the flowing, it would not be a revival of any suspended right, but a creation of a new one, having its origin in the grant, and in facts existing subsequent thereto, but in no way depending upon the situation of the estate at any time prior to or during the unity of possession, as in the case of easements or servitudes; if the proprietor of the land or tenement for which the easement or service was established, acquire the property of the land or tenement which serves, and afterwards sells it again without reserving the service, it is sold free, for the easement or service was extinguished by the unity of possession, and is not re-established to the prejudice of the new purchaser: Domat's Civil Law, lib. 1, sec. 6, tit. Services.

We do not perceive that the instructions moved for in the defendants' third request were either expressly or substantially given, and believing the law to be as the court were requested to instruct the jury, a new trial must be granted. It is therefore unnecessary to discuss at length the other questions arising in the case.

The instruction "that as lot No. 49 was bounded on the river, it extended to the thread of the river," is undoubtedly correct. It was urged in argument, that this principle did not apply to natural ponds and large collections of water, and that the boundary of lot No. 49 was a natural pond of two hundred rods in width, even before any flowing or obstruction by dams. How far such a state of facts would render the principle of law involved in this part of the charge inapplicable, we are not called upon to decide, as the case before us does not show the existence of the facts. The law of boundary, as applied to rivers, would no doubt be inapplicable to the lakes and other large natural collections of fresh water within the territory of this state. At what point its applicability ceases, it is unnecessary now to consider, as the case does not call for it. Again, it was urged in the argument, that the complainant could not recover, because, by the terms of the conveyance under which he held, he was limited by the margin of the pond, as kept up by the dam; and the counsel supposed a case, where a grantor

conveys by boundaries designated on a plan, and contended that by these boundaries the grantee must be governed. No doubt he must. The grantor has a right to prescribe such limits to his grant as he pleases. If he bounds by a river, the grant extends to the channel; but he may bound by monuments, which will limit his grant to the bank, or at any other point he pleases: *Dunlap v. Stetson*, 4 Mason, 349. We have not before us any evidence that the grant of No. 49 was in express terms, or by reference to any plan or designated monuments, limited to the margin of the pond.

As to that part of the charge which relates to presumption of grant or license, we forbear to enter into a discussion of the question it involves.

This court have decided in *Tinkham v. Arnold*, 3 Greenl. 120, that the flowing of lands for the support of mills for any term of time, furnishes no presumptive evidence of grant. Whether it may not amount to presumptive evidence of license, remains to be settled. Here is a case where mills have been standing and water flowed, as at the present time, for one hundred years, and no claim for damages ever been asserted until the present suit. The party complainant has himself been in possession of lot No. 49, under title, upwards of thirty years, during all which time the flowing has been uninterruptedly continued to the prejudice of his rights, if he had any. He and his grantors have seen the dam raised and lowered, repaired and rebuilt, without manifesting any opposition, or asserting any claim either to compensation for flowing, or to the land itself, and whether such facts, although not sufficient to raise a presumption of grant, may not afford presumptive evidence of license, so as to bar his claim to damages, is a question entitled to grave consideration: *Clement v. Durgin*, 5 Greenl. 14. We are aware that the law giving to mill-owners a right to flow the land of others, which is a departure from the principles of the common law, has been viewed with some degree of jealousy, and that the policy of continuing its provisions has been doubted: *Stowell v. Flagg*, 11 Mass. 368. It is not our province to judge of the expediency of the law, but to administer it according to its fair interpretation. By it, the right to flow is granted, and also the correspondent right to damages. But where the flowing is under a license, or a grant of easement, the right to damages, under the statute, is barred.

INSTRUCTIONS TO JURY should be positive and specific, leaving nothing to inference: *Snyder v. Laframboise*, 12 Am. Dec. 187; but need not and should not embrace answers to mere abstract questions: *Irish v. Smith*, 11 Id. 648.

STINSON v. SNOW.

[10 MAINE, 263.]

RETURN OF AN OFFICER ON A WRIT, as to the service of it, is conclusive on the parties to the suit, and can not be contradicted except in an action against the officer for a false return.

ASSUMPSIT on a promissory note. Defendant pleaded in abatement that the summons mentioned in the return of the officer was *in hæc verba*, setting it out; by which it appeared that defendant was summoned to answer William J. Farley, and not to the plaintiffs, and averred that the officer neither gave the defendant in hand, nor left at his usual place of abode, any other or different summons in said action than the one set forth. Plaintiffs in their replication set out the officer's return in these words: "By virtue of this writ I have attached a chip, the property of the within-named Snow, and at the same time gave him a summons in hand for his appearance at court according to law," and concluded with an averment that the defendant was estopped from denying the truth of the return. To this there was a demurrer and joinder.

Barnard, for the defendant.

Allen and Farley, contra, cited *Slayton v. Chester*, 4 Mass. 478; *Bott v. Burnall*, 9 Id. 99; *Id. v. Id.*, 11 Id. 165; *Winchell v. Stiles*, 15 Id. 232; *Bean v. Parker*, 17 Id. 601.

By Court, MELLETT, C. J. The sufficiency of the plea in abatement is not contested, provided the defendant is not estopped to plead the facts which compose it; if he is so estopped, then the plea must be adjudged insufficient, and he must answer over to the merits. In the replication, the plaintiff sets forth, *in hæc verba*, the officer's return on the writ in the action, and distinctly relies on the return by way of estoppel.

A writ of attachment is directed to the proper officer; the summons to appear and answer to the action is directed to the defendant. To make a legal service of such a writ, it is necessary for the officer who undertakes to serve it, to attach some of the defendant's property, and deliver such summons to him, or leave it at his last and usual place of abode, or else arrest the body of the defendant. In the case before us, there was no arrest. In performing both the acts which constitute a legal service of the writ, namely, attaching property and leaving the summons, the officer serving it acts under the authority of the writ; and, without that authority, he can not lawfully perform

either of those acts. If he should have a writ against A., and, intending to leave it at his last and usual place of abode, a summons to him to answer in that action should, by design or mistake, leave a summons directed to B., or a summons directed to A, but to answer to a different plaintiff, it is evident that in neither of those cases would he act under the authority given to him by the writ, but without any authority. Now, by inspecting the officer's return, as set forth in the replication, it appears that in making the service, that is, in making the attachment of property, and leaving the summons at the last and usual place of abode of the defendant, he acted by virtue of the plaintiffs' writ. This is expressly stated; and what is expressly stated in the return, unless it a mere matter of law, can not be contradicted except in an action against the officer for a false return. We may further observe, as a matter of almost universal practice, that officers, in their returns on writs of attachment, seldom, if ever, describe, in any manner, the summons; the language usually is, after stating the attachment: "and gave a summons in hand to the defendant," or "left a summons at his last and usual place of abode." If the court should sustain the plea in abatement in this case, it would probably lay the foundation for hundreds of writs of error, where judgment has been rendered on default, and the returns of service were not more descriptive and definite than that in the present case. For the reasons we have given, we are all of opinion that the return is an estoppel upon the defendant, and we adjudge the Plea in abatement insufficient.

JUDGMENT AT LAW, BASED ON FALSE RETURN OF SERVICE OF PROCESS.—This subject is discussed in the note to *Taylor v. Lewis*, 19 Am. Dec. 137.

RETURN OF SHERIFF OR OTHER OFFICER, WHEN AND UPON WHOM CONCLUSIVE.—See *Blythe v. Richards*, 13 Am. Dec. 672; *Diller v. Roberts*, 15 Id. 578; *Stevens v. Brown*, 23 Id. 215; *Whitaker v. Sumner*, 19 Id. 298; *Denny v. Wilard*, 22 Id. 389.

SCHWARTZ v. KUHN.

[10 MAINE, 274.]

OWNER OF LAND CAN NOT CONVEY it to a third person, while it is in the adverse possession of another; but he may convey it to the disseisor.

WHERE A PERSON WENT INTO POSSESSION of part of a tract of land under a deed for the whole tract, from one having no title, and subsequently received a deed for a large part of the same tract from the person having the title thereto, it is a question of fact for the jury to determine, whether, by receiving the last-mentioned deed, such person did not intend to abandon his adverse possession to the whole tract, and claim only that part conveyed to him by such deed.

TRESPASS, *q. c. f.* Plaintiff claimed title to the *locus in quo* by deed from William Sullivan, dated February 5, 1822. The question presented was, whether Sullivan was so seised on that date as to be legally capable of conveying the title. It appeared that in 1799, one Eugley entered upon a tract of land, of which the *locus in quo* was a part, under a deed from Jacob Benner, recorded in 1812, but that no part of the land in dispute was actually occupied by him. That in October, 1808, John Gleason, as the attorney of Henry Jackson, who was then the owner of a tract of land of five thousand acres, including the land in dispute, and under whom Sullivan derived his title, entered upon said larger tract, surveyed and took possession of it. It did not appear that there was an entry on the land in Eugley's possession. On August 8, 1815, Eugley received a deed from Sullivan of a large part of the tract, which he had entered under Benner's deed, not, however, including the land in dispute, and on September 16, 1830, Eugley conveyed the whole to Kuhn. The jury were instructed, that the entry by Gleason and Jackson in 1808, was sufficient to purge the disseisin committed by Eugley, and that the deed of Sullivan to the plaintiff passed a good title to the *locus in quo*. Verdict for plaintiff.

Allen and Reed, for defendants, cited *Kennebec Purchase v. Laboree*, 2 Greenl. 275 [11 Am. Dec. 79]; *Higbee v. Rice*, 5 Mass. 344 [4 Am. Dec. 63]; *Green v. Liler*, 8 Cranch, 250; *Stearns on Real Actions*, 42.

E. Smith, contra, cited *Langdon v. Potter*, 13 Mass. 219; *Codman v. Winslow*, 10 Id. 146; *Stearns on Real Actions*, 384; *Brown v. Porter*, 10 Mass. 100.

By Court, MELLETT, C. J. As both parties claim under Sullivan, both admit his original title. The case finds that though the deed from Benner to Eugley of the large tract included the *locus in quo*, and though Eugley entered on the land, and has ever since lived on the westerly part of it, yet he was never in the actual possession of the *locus in quo*. Of course, Sullivan was not disseised of any part of the large tract, except that part which Eugley held in actual and exclusive possession until his deed from Benner was registered in 1812. Then a disseisin of Sullivan commenced. Therefore, no entry by Jackson, in 1808, was necessary to enable him to convey to the person under whom Sullivan held. We need not inquire whether such entry was sufficient to purge the disseisin, provided Jackson had then been disseised, because he was not disseised as to the *locus in*

quo. For this reason the instructions of the judge as to the legality and sufficiency of Jackson's entry may be laid out of the case, as wholly immaterial in the decision of the cause. After Eugley's deed was registered, it is clear that Sullivan could not convey to a third person any part of the tract described in Benner's deed, so long as the disseisin continued, which was created by the registry of that deed and Eugley's open and permanent possession of a part of the tract conveyed by the deed: *Proprietors Kennebec Purchase v. Laboree*, 2 Greenl. 275 [11 Am. Dec. 79], and cases there cited; *Little v. Megquier*, Id. 176; *Gookin v. Whittier*, 4 Id. 16. Still he might sell and convey all or any part of the tract above mentioned to Eugley, the disseisor, without violating any principle of law or public policy, and therefore, by Sullivan's conveyance to him, he acquired an indefeasible title to the land described in the deed. As to this there can be no question; but under certain circumstances the transaction might have legally been followed by other consequences in reference to the residue of the tract conveyed by Benner's deed, which deserves serious consideration, but seems not to have received it. Now, if by the above arrangement between him and Sullivan, the intention was that the possessory title of Eugley in the whole tract should be yielded and abandoned to Sullivan for the sake of obtaining from him a perfect legal title as to a large part of the tract, the effect would have been to give complete operation to Sullivan's deed to Schwartz, which unquestionably in its description embraces the *locus in quo*.

There are many reasons for presuming this to have been the true character of the above-mentioned arrangement. In the case of *Fox et al. v. Widgery*, 4 Greenl. 214, it appeared that Storer was supposed to be sole owner of the whole tract of land, whereof partition was prayed, being in possession and claiming the whole; but, in truth, the title to a part of it belonged to the heirs of Titcomb. In this situation of things, Widgery, the ancestor of the respondent, levied his execution in due form on the whole tract as the estate of Storer. Afterwards, Widgery purchased the title of six of the heirs, and applied to another heir to purchase his. The judge who tried the cause ruled that Widgery's acceptance of those deeds and application for a deed from another, amounted to a waiver of all possessory claims, and put an end to any supposed disseisin of the true owners, and that after he had purchased of six heirs of Titcomb, he must be considered as holding in common with the seventh heir. On a question reserved, the court set aside the verdict,

saying: "The question, whether it was in fact or intended to be a waiver or abandonment of those rights" (acquired by the supposed disseisin), "was one proper for the consideration of the jury, and which, as such, should have been submitted to their decision, it being a question of intention." A title by disseisin is not a subject of favor in a court of law, and the character of the transaction above mentioned, as to the conveyance from Sullivan to Eugley, seems not to have been considered by the court and jury, but their attention was distinctly drawn in another direction by the instruction of the judge as to the legality and effect of Jackson's entry, which instruction, though unimportant in respect to the real merits of the cause, as we have before stated, we are satisfied was incorrect. Such being the situation in which the parties stand before us, we think that the question of intention in making the arrangement between Sullivan and Eugley should be submitted to a jury, in order to ascertain whether Eugley's disseisin was thereby purged and completely done away as to the whole of the tract conveyed to him by Benner, according to the decision in *Fox et al. v. Widgery*. Accordingly, the verdict is set aside, and a new trial granted.

COWAN v. ADAMS.

[10 MAINE, 374.]

AN AGENT AUTHORIZED TO SELL HIS PRINCIPAL'S PROPERTY, with instructions that such property was to remain the principal's until paid for or amply secured, has no authority to sell such property and deliver it to the purchaser, without its being paid for, notwithstanding the latter agrees that a lien shall be retained upon it until paid for.

STATUTE OF FRAUDS RELATING TO CONTRACTS for the sale of goods, etc., can not be made available as a defense, except by him who is sought to be charged by such contract, or his legal representatives.

TRESPASS for taking and carrying away a quantity of pine mill logs, cut in the winter of 1828-9, by plaintiff, on a township of land owned by John P. Boyd, which he purchased in July, 1828. Immediately after the purchase, Boyd requested E. T. Bridge to take charge of the land and to give plaintiff the preference in purchasing timber thereon, if he would pay as much as other purchasers. Several letters written by Boyd to Bridge, which are noticed in the opinion, show the extent of the authority given to the latter in the sale of the timber. In the fall of 1828, Bridge informed Boyd that plaintiff was cutting timber on his township, and thereupon Boyd directed that the logs be

seized, but Bridge informed him that he thought that it would not be for his interest to seize the logs, but that he had better wait until spring, have the logs scaled, and take pay for the standing timber, and to this Boyd assented. In April, 1829, plaintiff and Bridge agreed upon one Morris to scale the logs, who did so, and made his report to Bridge, and he to Boyd. For the timber thus cut and scaled, Bridge settled with plaintiff at one dollar per thousand, deducting fifteen per cent. from the aggregate scale. Boyd was to have a lien upon the timber until paid for. Boyd paid Morris for one half his services. Plaintiff was to take charge of the logs and send them to market subject to Boyd's lien. The sum to be paid by plaintiff was eight hundred and fifty dollars and sixty-seven cents, which was predicated on Morris' survey. In 1830 the logs were sent to market by plaintiff, and out of the proceeds he paid Bridge six hundred dollars on account of his contract. Of this amount five hundred dollars were sent to Boyd, and the balance Bridge credited him on account. No other payment was made prior to Boyd's death, in November, 1830.

Defendants introduce a deed from Boyd to Tarbell, one of the defendants, dated August 23, 1830, conveying the township on which the logs were cut, and also Tarbell's deeds of one third to each of the other defendants. They also introduce the deposition of Samuel Adams, who testified that he, as the agent of Boyd, effected the sale of the township to Tarbell. That Boyd informed him that he intended to convey with the township all the logs and timber standing or cut, and after the deed was given, he, Boyd, had offered to give a separate instrument to that effect, but that was not done. It was proved that the logs in controversy at and after the giving of the deed by Boyd to Tarbell, were lying within the limits of the township where they had been cut, and that subsequently they were taken by defendants' agent and sent to market under defendants' direction after they had taken possession of the township. The court instructed the jury that the authority given by Boyd to Bridge was sufficient to enable him to transfer the interest of Boyd in the logs, and that the letters from Boyd to Bridge, the contract of plaintiff, and the testimony of Bridge, were sufficient evidence that the authority was fairly exercised and the property in the logs transferred to the plaintiff, subject to Boyd's lien. The court also instructed the jury that neither the deed nor the agreement from Boyd to Tarbell could operate to convey logs to the defendants, which Boyd had either by himself or agent previously sold to plaintiff. The court further instructed

the jury that although the logs in controversy were on the land purchased by defendants, they were not defendants' property, and the taking of them by their agent was a violation of plaintiff's rights, that made them trespassers. Verdict for plaintiff. If the instructions were incorrect, the verdict was to be set aside, and a new trial granted.

Allen and Sprague, for the defendants. 1. The logs in question lying upon the land at the time of the conveyance, passed by Boyd's deed to Tarbell: *Farrar v. Stackpole*, 6 Greenl. 154 [19 Am. Dec. 201]; *Lassell v. Reed*, 6 Id. 222; 4 Dane Abr., art. 9. 2. Bridge never sold to plaintiff; at most it was a mere contract to sell. 3. Bridge had no authority to sell without payment or security. 4. Defendants were not liable in this form of action. The land was theirs, and they had a right to remove the logs therefrom.

Boutelle and Potter, contra. The deposition of Adams was inadmissible; *Bartlett v. Delplat*, 4 Mass. 702; *Clark v. Wait*, 12 Id. 439. If admissible, and it prove a sale, then the sale would be within the statute of frauds, and so nothing passed to the defendants. If Bridge had no authority to make the sale in the manner he did, yet if Boyd knew it and made no objection, it may be construed as a confirmation of the sale: *Frothingham v. Haley*, 3 Mass. 70. Plaintiff has a good cause of action, and trespass is the proper remedy: 5 Dane Abr. 559; 9 Pick. 552; *Cowing v. Snow*, 11 Mass. 415; 3 Stark. Ev. 1490; 2 Saund. 47, note c; 1 Chit. on Pl. 48.

By Court, MELLETT, C. J. The plaintiff claims a right to maintain this action against the defendants, and recover damages for the alleged trespass by them committed, in virtue of a contract made with Bridge as the agent of Boyd, in April, 1829. It appears that the logs, respecting which the contract was formed, had been before that time cut by the plaintiff, without permission, on Boyd's land, and were then lying there. It is important to ascertain the nature and extent of the instructions and authority given by Boyd to Bridge, in relation to the logs in question; and in the next place, the nature and consequences of the contract as made, if made in conformity to the instructions and power given by Boyd to his agent. The evidence as to the nature and extent of Bridge's authority is principally derived from Boyd's letters to him; for Bridge, in his testimony, speaks of no other or verbal instructions, though he describes them in the manner in which he seems to have understood them in making the contract with Cowan. In Boyd's

letter of August 22, 1828, which has almost exclusive reference to the logs in question, he says, as to the disposition of them, "contracts should be so made that the logs are to be my property until paid for." In another letter of December 23, 1828, he says: "Refer to my advice of August 22, the logs always to remain my property until ample security or payment is made." Again, in his letter of April 27, 1829, about the time the contract was made, he says: "I have your favor of the twenty-fourth. The care of my property in Tom Hegan, was committed to your legal knowledge, with my several advices: 1. To request your father's advice respecting the trespass of Cowan. Next, that payment of all logs cut should be made in June, and to hold the logs until absolutely paid for." In no one of his letters is any authority given to make any disposition of the logs, by which the property of them should pass to Cowan, until they should be fully paid for.

It is contended by the counsel for the defendants, that the contract made by Bridge was not justified by his instructions; and that, as they claim under Boyd, they are interested in this question, and, of course, are entitled to contest the validity of the contract, as made by Bridge and Cowan. And they further contend that the contract, as made, amounts to a transfer of the property of the logs to Cowan, and that a lien only is reserved to Boyd, upon the logs, as security for payment; and that such a lien, unaccompanied with a possession of the logs, was of no use to Boyd, or of any legal effect, whatever the parties might then have supposed. It here becomes necessary for us carefully to examine the alleged distinction, and the rights which Cowan would have had, in respect to the logs in question, had the contract been made in the spirit and terms of the instruction; and also what are his rights, according to the terms of the contract as stated by Bridge, in his testimony. His own words are: "It was agreed that Boyd was to have a lien upon the timber, until paid according to the plaintiff's contract." He adds, that Cowan "was to take charge of the logs and run them to market, subject to Boyd's lien." If there is a material distinction between the contract as made, and as it was the duty of Bridge to make it, in pursuance of his instructions, in regard of the legal rights of Cowan under the contract, then Boyd was not bound by it, and Cowan acquired no rights under it, unless Boyd afterwards ratified and sanctioned the contract, as made; of which fact there is no evidence before us. This is a principle of law perfectly familiar: Paley on Agency, 150, 151. The parties to a contract are always supposed to have

some object in, or some expected advantage from, the insertion of the stipulations and provisions it contains. In giving his instruction to Bridge, Boyd must have considered the logs as unsafe, under the absolute control of Cowan, as his letters distinctly show, and as liable to be seized by Cowan's creditors; the object of both parties must have been to secure his interests against that peril, in a manner deemed legal and sufficient.

In the action of *Waterstown et al. v. Getchell*, 5 Greenl. 435 [17 Am. Dec. 251], the nature of such a contract as was intended by Boyd has been the subject of examination and decision by this court. The facts were these: 'The plaintiffs entered into a contract with Robinson, by which they granted him permission to enter upon their tract of land and cut and carry away therefrom, pine timber, which was to be floated down to certain specified places. The contract contained a clause, "that the ownership of all the timber so cut, how or wherever situated, should be and continue in the hands of Waterstown *et al.* until all sums due them, etc., shall be paid and discharged, and all the conditions of this agreement fulfilled." Robinson sold the timber to the defendant, who knew of the reservation, and the plaintiffs recovered against him. Suppose the contract had been made as Boyd directed, the property to remain in him till payment (which has never been made), how could Cowan be viewed, in a legal sense, anything more than the agent or servant of Boyd in running the logs to market? In such case, the possession of Cowan would have been the possession of Boyd, for the purposes of protecting his own rights, reserved to him by the contract. On what principle, then, can the plaintiff maintain the present action and recover damages equal to the value of the timber? If he can so recover, of what use is the cautionary proviso in the contract, as to Boyd's ownership of the logs till paid for? The whole benefit of it is lost at once, and it is taken from him in direct violation of the property of the owner, Boyd, and contrary to the express agreement of the parties, made for the sole purpose of protecting it from violation. The design was to leave the property in Boyd, to prevent Cowan from disposing of it as his own property, or its being attached or seized on execution by his creditors, and in either case, that he might have it in his power, by asserting his right, to reclaim the property for his own use. His object was to have the legal control of it and of its avails. The contract authorized to be made was a legal one.

But in the manner the contract was made by Bridge, if Boyd was bound by it, then the property of the logs was transferred

to Cowan, subject, it is said, to the lien of Boyd for the amount due. But on this principle there was no lien; for the logs were in the possession of Cowan. "No lien can be acquired, unless the property on which it is claimed came into the possession of the party claiming it:" *Kinloch v. Craig*, 3 T. R. 119; *Whitaker on Lien*, 65; *Portland Bank v. Stubbs et al.*, 6 Mass. 462 [4 Am. Dec. 151]. Nor continue any longer than his possession of such property continues: *Jones v. Pearle*, 1 Stra. 556; *Doug.* 97; 1 *East*, 4; 7 *Id.* 5. The consequence of which must be, that the absolute property vested in Cowan, contrary not only to the repeated directions of Boyd, but the idea and intention of Bridge. However, upon a full view of the facts of the cause, touching this branch of it, and the principles of law applied to them, we are satisfied that the contract made by Bridge and Cowan was not authorized by Boyd's instructions, and think the presiding judge's opinion erroneous on this point; and that the contract, therefore, must be deemed a nullity, unless it has been since ratified by Boyd, as we have before observed, of which we have no evidence.

The only remaining question is, whether the plaintiff can maintain the action against the defendants on his alleged possession of the logs, without other title. If they are to be considered as strangers, and without any privity with Boyd, we think the authorities cited, and many others, clearly show that the plaintiff is entitled to recover; but is there not a privity existing between Boyd, or his heirs, and the defendants? On the twenty-third of August, 1830, Boyd made a deed of the township to Tarbell, one of the defendants; and he conveyed one third part of it to each of the others; and Samuel Adams testifies that in a conversation with Boyd, which was before the deed was given, he told him, after some conversation respecting the logs and timber, that he meant to convey all the logs and timber standing or cut, and offered to give a separate instrument for it. He had a right to do this, inasmuch as the contract made with Cowan was not binding upon Boyd. On this principle, as the defendants claim the logs under Boyd, they are not strangers, and of course may defend themselves, if the sale of the property by Boyd to them was complete and effectual. No writing was necessary to make the sale valid. At the time the property was lying on his land, and in his possession, he then had a legal right to dispose of it. But it has been contended that the sale of the timber was void by the statute of frauds, sec. 3, the property being sold for a price exceeding thirty dollars. To say the least of it, it seems to

be a singular objection for Cowan to make. He was no party to the contract, nor representative of a party. The third section of chapter fifty-three of the revised statutes declares that no contract for the sale of goods, etc., for the price of thirty dollars, or more, shall be allowed to be good, except the purchaser shall accept part of the goods and actually receive them, or give something in earnest, or in part payment, or some note in writing, of the bargain made and signed by the party to be charged by such contract. Here, it is evident that a party attempted to be charged by the contract is the person objecting to the charge made; and in all the cases where the question has arisen, a party to the contract or his legal representative made the objection when called on to perform his contract. Surely no person can plead infancy or the statute of limitations but a party to the contract thus attempted to be avoided, or his legal representative. Neither Boyd nor his representatives are dissatisfied with the sale he has made. But, independent of the above observations, by attending to the facts in the case, we perceive that the objection is not supported by facts. When the conveyance of the township was made by General Boyd in August, 1830, the timber on the land, as well as the land, passed into the possession of Tarbell, who made the purchase for all the defendants. In this manner the sale was perfected and complete: 2 Stark. 609; *Searl v. Keeves*, 2 Esp. Cas. 598. The next spring, the defendants, by their agent, took the property and removed it, and appropriated it to their use.

On the whole, we are of opinion that the action is not maintainable upon the evidence before us, and accordingly the verdict is set aside, and a new trial granted.

BROWN v. MEADY.

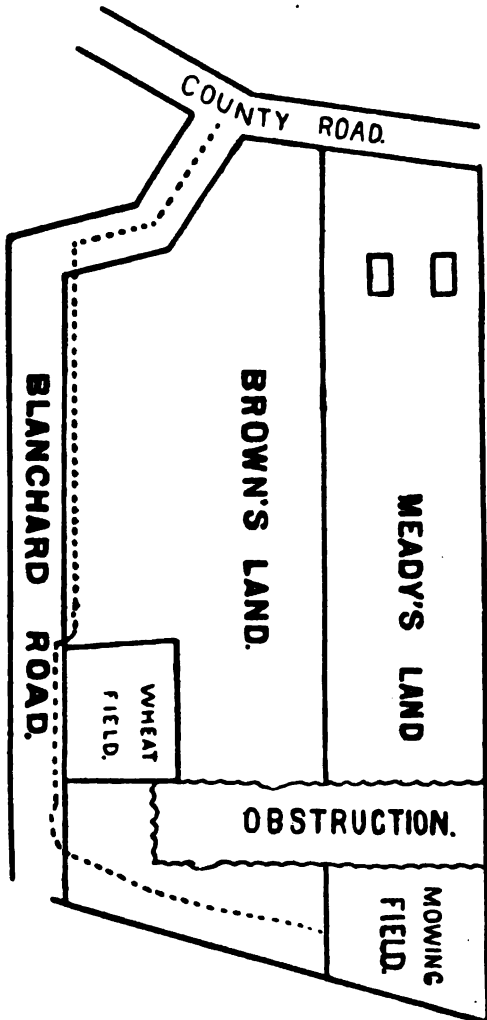
[10 MAINE, 391.]

RESERVATION IN A DEED by which the grantor reserves to himself "the right of passing and repassing with teams in the most convenient place across the land conveyed," does not restrict the right of way to a transverse one; it may be both transversely and lengthwise, as may be most convenient to the grantor.

WORDS "ACROSS THE LAND CONVEYED," in a reservation in a deed, may mean over the land; they do not necessarily exclude the idea of passing over a parallelogram in a longitudinal direction.

TRESPASS, q. c. f. Plea, general issue, and claim of a right of way. The lot upon which the trespass was alleged to have

been committed was formerly owned by defendant, who conveyed it to J. Brown, under whom plaintiff claimed. The deed from defendant to Brown, dated March 23, 1831, contained the following reservation: "And the said Alexander," the defendant, "hereby reserves to himself the right of passing and re-passing with teams in the most convenient place across the land here conveyed." The land of plaintiff and of defendant, the buildings of the latter, and other objects hereinafter referred to, are delineated on the following plan:



At the rear of the lots there was a high, steep hill, marked "Obstruction," which was impassable by teams, and separated defendant's mowing field from the field on which his buildings were situated. It appeared that the most convenient way which defendant could get to his mowing field, was by the route designated by the dotted lines. The passing along the dotted line was the trespass complained of. It was proved that the defendant had requested Brown to mark him out a way, but Brown told him he must go by the "Blanchard road." It also appeared that about ten years prior to the commencement of this action, Blanchard had given defendant permission to pass over said road. Blanchard was called by plaintiff, and testified that he told defendant that he might pass over his road, but that he refused to give defendant a writing to that effect. That the land over which the Blanchard road passed was his, and that no one had a right to pass there without his permission; that he would not give defendant any permanent right to pass over that road, but that he might do so for the present. Weston, J., ruled that the defendant was not authorized to pass over the land conveyed, and that the reservation and facts proved did not justify the entering and breaking complained of. Defendant thereupon consented to a default, with the understanding that if such ruling was erroneous, and that the reservation and facts constituted a good defense, the default was to be set aside, and plaintiff was to be nonsuited.

Sprague, for the defendant.

Otis, for the plaintiff, cited *Senhouse v. Christian*, 1 T. R. 560; *Russell v. Jackson*, 2 Pick. 574; *Comstock v. Van Deusen*, 5 Id. 163; *Wincook v. Bergen*, 12 Johns. 222; *Jones v. Percival*, 5 Pick. 485.

By Court, MELLE, C. J. Meady, being the owner of a piece of land nearly in the form of a parallelogram, extending in a south-east direction from a county road at the north-west end of the tract, and bounded on the south-west side by land of one Blanchard, sold the south-west half of the tract to the plaintiff, Brown, and the deed contains this clause: "And the said Alexander (the defendant) hereby reserves to himself the right of passing and repassing with teams, in the most convenient place, across the land conveyed." The object which the parties had in view in reserving this right of way is apparent upon the report of the case, namely, because Meady had no convenient way in which he could pass, on his own land, from his buildings

near the north-west end of the lot to his mowing field at the south-east end of it. The case further finds that the same hill or precipice forming the before-mentioned obstruction extends so far upon the land conveyed to Brown that the most convenient way in which the defendant could reach his mowing field, without going on Blanchard's land, was by the route which he took. The private way which had been used by the consent of the plaintiff, defendant, and Blanchard for several years before the deed was given, ran from the public road, before named, over a part of the north-west end of Brown's lot in an easterly direction to and on the land of Blanchard, and so that in order to reach his mowing field he must again cross over Brown's lot after leaving the private way. And the defendant could pass only by sufferance on Blanchard's land. These are the principal geographical facts in the case, and they are presented without objection from either of the parties, and, as mentioned in the case of *Comstock v. Van Deusen*, they were properly presented and received as facts surrounding the question, and necessary to its correct decision.

What, then, is the true construction of the language employed in the reservation? In the first place, the object was to secure to Meady "a right," not an indulgence. It was a right to pass over the land of Brown, for the reservation goes to diminish the value of his land, and in its operation must have been intended to give the same rights to Meady, as though Brown had by his deed granted the easement to Meady. If we consider the contracting parties as acting with understanding, and Meady with common prudence, we must presume that the design was to reserve to himself a right to pass to his mowing ground without being a trespasser on any one, or resisted by any one, and a right which would answer his purpose. The presiding judge, we think, gave too restricted a construction to the word "across." We can not think that, in then existing circumstances, the design in using that word was merely to reserve a right to cross Meady's land, and trust to an indulgent owner of the adjoining land for permission to go a step further. The word "across" may mean "over;" it does not necessarily exclude the idea of passing over a parallelogram in a longitudinal direction. To pass across a bridge is a common expression, but does not mean to pass from one side of it to the other. In the cited case of *Comstock v. Van Deusen*,¹ the reservation was "to cross lot No. 16, above mentioned." Wilde, J., says, in

delivering the opinion of the court: "The words of the grant are to be understood according to their common meaning, unless it appears that the parties intended to use them in a different sense. The way claimed by the defendant is not across the plaintiff's lot, according to the usual acceptance of the word, and it can not be presumed, from the facts and circumstances reported, that it was otherwise understood by the parties."

In *Senhouse v. Christian*, it was decided that a right to make transverse roads across the slip of land in question, was not conveyed by a grant of a way from A. to B., in, through, and along a particular way. Buller says: "Here the limits of the grant are mentioned." This is very different from the case before us. The counsel for the plaintiff has also contended that the defendant had once made his election, by traveling in the private way above mentioned. This argument is not sustained by the facts of the case. The passage across the end of the lot, to the private way on Blanchard's land, was the result of a temporary arrangement made by the parties in this action and Blanchard, for mutual accommodation. It depended for its continuance on the uncertain indulgence of Blanchard. All this has no resemblance to the designation, claimed of right, under the reservation in the deed. He was obliged to resort to this course, as the plaintiff would not, though requested, mark out a way, many months before. The way designated is in the most convenient and proper place; of course, the act of which the plaintiff complains as a trespass on his land, was only the due exercise of a legal right.

We are all of the opinion that the action can not be maintained. According to the agreement of the parties, a nonsuit must be entered.

BALDWIN v. FARNSWORTH ET AL.

[10 MAINE, 414.]

A CONTRACT PROVIDING FOR THE DELIVERY of a spinning machine at a time and place certain, is sufficiently complied with, if such machine is delivered and received without objection, at a subsequent time.

DEMAND OF PAYMENT OF A NOTE, payable at the dwelling-house of the makers, is sufficient, if demand is made of both such makers at the barn-yard of one of them, and no objection is made by either as to the place where payment is thus demanded.

ASSUMPSIT on the following agreement in writing: "Dennysville, September 11, 1830. For value received of William Baldwin, we, the subscribers, jointly and severally promise to

pay him or order forty-four dollars, in one year from date, and interest, payment to be demanded at their dwelling-houses in Dennysville. The conditions of this note are these, that if the said Baldwin shall, within four weeks from date, deliver, or cause to be delivered, at the store of Samuel E. Crocker, in Portland, one complete and warranted fancy spinner, agreeable to the late patent granted to John R. and Joseph B. Wheeler, of the state of New York, then this note to be good; otherwise, void and of no effect. Jonas Farnsworth, Theodore Wilder, jun." Plea, the general issue. Plaintiff proved by one William Woodworth, that at the request of plaintiff, some time in the fall of 1831, he went with said note to defendants for the purpose of demanding payment; that he found them in Farnsworth's barn-yard, and there requested payment of the note; that they declined to pay it, but made no objection to the place or manner of the demand. Plaintiff also proved by one Foss, that in the fall of 1830, Farnsworth told him that he had a spinning machine in his possession, which Baldwin had sent to him, and that it worked well. Whitman, C. J., who tried the cause in the court below, instructed the jury that the demand proved was a sufficient compliance with the terms of the contract in that particular; and that if they were satisfied that a machine answering the description of that engaged to be delivered to the defendants had been received by them of the plaintiff, before the making of said demand, without objection on their part on account of its not having been delivered within the time stipulated in said contract, they might be considered as having waived their right to make such objection. Verdict for plaintiff. The cause came up on exceptions to said instructions filed by the counsel for defendants.

D. Williams, for the defendants.

Otis, contra.

By Court, WESTON, J. The jury have found that the defendants had received, before payment of the note was demanded, a spinner, answering the description therein set forth. It was not delivered at the place or within the time stipulated; but being accepted subsequently, the jury were properly instructed, that the defendants thereby waived their right to have exacted strict performance.

There is in the note something peculiar with regard to the place of payment, inasmuch as more than one place was appointed. It may be understood that the defendants reserved

to themselves the right to pay, either at the one place or the other. But if the note was made payable at either place, it would be incumbent on the defendants to show that they had the money ready at one of them: *Ruggles v. Patten*, 8 Mass. 480; *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 Id. 248. This they have not done. But something further seems to have been contemplated, than the right to pay at the places appointed. The plaintiff was to demand payment there. Payment was demanded of Farnsworth, personally, in his own barn-yard, which, as to him, must be considered a sufficient demand, as he made no objection, and intimated no readiness to pay in the house. Whether anything more was necessary, in a joint and several promise, to put the defendants upon proof that the money was ready at the other dwelling-house, may be questionable; but it appearing that a demand was made upon the other defendant also, at the same time and place, that he made no objection to the place or manner of the demand, and that he gave to the plaintiff no notice that he was prepared to pay at his own dwelling-house; we concur in opinion with the judge below, that the plaintiff proved a sufficient demand.

The exceptions are overruled, and there must be judgment on the verdict.

NOTE PAYABLE AT A PARTICULAR PLACE.—In the note to *Wolcott v. Van Santvoord*, 8 Am. Dec. 396, the necessity of averring a demand at the time and place mentioned in a note payable at a particular place, is considered.

RUSSELL v. RICHARDS.

[10 MAINE, 429.]

FIXTURES—MILL ERECTED BY TWO PERSONS upon the land and mill privilege of a third, with his permission, for the purpose of trade and manufacture, does not become a part of the freehold, but remains the personal property of the persons who built it.

WHERE A. AND B. ERECTED A MILL upon the land and mill privilege of C., with his permission, and subsequently the mill was sold as the personal property of the former, the latter being present at the sale, and declaring that he had no claim or title thereto, he can not thereafter, by a deed of the mill and land, convey the former, although his grantees have no notice of its sale as the personal property of A. and B.

TROVER for a saw-mill, mill-chain, and dogs. At the trial, it appeared that the mill was built by Seth Emerson upon the land and mill privilege of William Vance, for Shubael B. Vance and Asa Church, permission having been obtained by the latter

from William Vance, to erect the mill upon his land and privilege. At the time Emerson contracted to build the mill, he took the guaranty of William Vance for the payment of the contract price. Shubael Vance and Church having failed to pay Emerson, he, at the request of W. Emerson, commenced suit against them, and attached the mill as their personal property, and upon obtaining judgment, sold the mill under execution to the plaintiff, on September 8, 1827. William Vance was present at the sale, and declared that he had no interest whatever in the mill. A short time after the sale, the latter went into possession of the mill, and on April 1, 1830, he being in possession by his lessee, sold the mill and privilege by deed of warranty to the defendants. The court instructed the jury that although as against William Vance, the mill might be seized and sold as personalty, and also against the defendants, if they purchased with knowledge or notice of plaintiff's claim; yet if the jury were not satisfied from the evidence that defendants had such notice, they had a right to hold the mill as real estate. Verdict for defendants, which was to be set aside if the jury were improperly instructed, and a new trial granted.

Sprague, for the plaintiff.

Allen and Boutelle, for the defendants.

By Court, **MELLEN**, C. J. The saw-mill in question was built on a tract of land, at the time belonging to William Vance, at the expense and as the property of his son, Shubael B. Vance, and Asa Church, and by the permission of Vance, the father. The case finds an open and express disavowal by the father, of any interest in or claim upon the mill. On these facts, according to the case of *Wells v. Banister and Trustee*, 4 Mass. 514; *Osgood v. Howard*, 6 Greenl. 452 [20 Am. Dec. 322]; and *Van Ness v. Packard*, Peters,¹ the mill was never the property of William Vance, and never become a part of the freehold; but was personal property belonging to Shubael B. Vance and Church, and as such, in September, 1827, was legally seized and sold on Emerson's execution against them to Russell, the plaintiff, for about three hundred dollars. It does not appear that Russell ever had any actual possession of the mill; but soon after the sale it went into the possession and occupancy of William Vance, and then into the possession of his lessee. On the thirtieth of March, 1830, William Vance conveyed several tracts of land, and among them the tract on which the mill in

1. *Van Ness v. Packard*, 2 Pet. 137.

question was erected, and the mill and mill privilege thereon, to the defendants in this action, for a valuable consideration; and the jury have found that they had not any knowledge or notice of the plaintiff's title and interest, at the time of their purchase. The question is, whether, on these facts, the plaintiff is to be deemed, in law, the owner of the mill, and entitled to recover damages; or whether it was legally conveyed to the defendants, and became their property, according to the instructions of the presiding judge. The case before us is not tinctured with any fraud or intimation of it. Who, then, has the better right? What authority had William Vance to sell the mill to the defendants, when he did not own it, or pretend to own it? And what act has the plaintiff done or omitted to do, by means of which he has lost his property, and the defendants acquired it? It is certainly a correct principle of law, that one man can not transfer the title of another to real or personal property, without his consent, express or implied, unless in certain cases, under statutory provisions; as in case of sales by guardians, executors, or administrators; or where it is transferred by the levy of an execution, or a sale of chattels by an officer on execution, or cases similar in principle. We can not perceive how the want of actual possession of the mill can be considered as having affected his title during the interval between the sale of it to the plaintiff, in 1827, and the conveyance to the defendants in 1830. If A. is the unquestioned owner of a carriage and horses, and places them under the care of B., his friend, while A. is on a voyage to Europe, B. can not deprive A. of his ownership, and convey a title to C., and enable him to hold them against A. If he could, a man could never be secure as to his title to personal property, unless he or some one in his behalf were to stand sentinel over it.

The case before us differs essentially from what it would have been if William Vance had owned the mill, and being insolvent, had conveyed it to Russell, but still had remained in open possession, and sold it to the defendants, *bona fide* purchasers, and for a valuable consideration. Russell's want of possession would be strong evidence of the fraud. It differs also from a sale made honestly by A. to B. of a bale of goods in payment of a debt, but before B. obtains a delivery and possession of the bale, C. attaches it for a debt due from A. to him; for in this case C. obtains possession first, and thus has the better title to the goods, as was decided in *Lansfear v. Sumner*, 17 Mass. 110 [9 Am. Dec. 119]. There both parties claimed

under the same person; but Russell claims under the former undisputed owner, and the defendants under a man who never had any property in the mill. The question as to priority of possession, therefore, is not presented in the case before us as having any legal influence; but the decision of the cause depends on priority of right; and William Vance had no more right to sell the mill than if Russell had been in exclusive possession of it. But it is urged that the defendants had a right to presume the mill to be a part of the freehold; and that such is always the presumption. In the present case, however, the fact was otherwise. But, surely, the possession of real estate is not considered stronger evidence of title than the possession of personal property. In the latter case, a sale of a chattel in the possession of the vendor amounts to a warranty of title; not so in case of real estate. That is, in case of chattels, the possession of them at the time of sale is so far evidence of title as to make the sale a warranty to the purchaser, but not sufficient to convey property which he did not own.

But independently of the reasoning by which we have arrived at the above conclusion, and of the principles on which we have relied, we would observe that according to the principles of the common law in England, which have long been recognized and adopted, and even extended in this country, the mill in question must be considered personal estate, and that it never was a part of the freehold and subject to the control of the owner of the land. It was a building erected for the purposes of trade and the manufacture of boards and other lumber; the manufacture and sale of which articles constitute the principal business of that section of the country. In this view of the subject, the decision is placed on grounds which can not now be shaken without disturbing rights and unsettling principles.

In the instance before us, the remedy of the defendants is on the warranty of William Vance. The principles stated in Judge Trowbridge's Reading, and those also in Dane's Abridgment, which have been cited, have more immediate reference to real estate, and can have no peculiar application to the present case. Our opinion is, that the instructions of the judge on the point reserved were not correct.

Verdict set aside and a new trial granted.

Upon the second trial of the principal case, the defendants requested the court to instruct the jury, "that the plaintiff had a reasonable time within which to remove the mill, and that three years could not be considered within a reasonable time for this purpose; and that the plaintiff might be considered

as having waived his right to the mill." The court, instead of so instructing the jury, instructed them, "that the mill having been originally placed upon the privilege of William Vance, by his consent, and that consent not appearing to have been revoked, and it not appearing that the plaintiff had been notified, either by Vance or by the defendants, his grantees, that the mill could not be suffered to remain there longer; or that the plaintiff had ever been directed or requested to remove the same, the lapse of three years neither operated to change the property, nor was it evidence that the plaintiff had abandoned the mill." Verdict was entered in favor of the plaintiff for five hundred dollars damages, and, on appeal, judgment was entered accordingly: *Russell v. Richards*, 11 Me. (2 Fairf.) 371. The principal case is cited with approval in *Holbrook v. Holbrook*, 11 Me. 364; *Hilborne v. Brown*, 12 Id. 162; *Jewett v. Patridge*, Id. 243; and *Tapley v. Smith*, 18 Id. 12. In *Fifield v. Me. Cent. R. R. Co.*, 62 Me. 80, the principal case was thus referred to: "The case of *Russell v. Richards*, 10 Me. 429, and subsequent cases, establish the doctrine here that *bona fide* purchasers who, even without notice, acquire the title to land, are not entitled to claim such structures as a house, store, or mill, standing on the land at the time of the purchase, if such buildings were at such time the property of a third person, although from their situation upon the land they had the appearance of being a part of the realty. The case of *Russell v. Richards* does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decision is rather opposed to it." See *Elwes v. Mawe*, 2 Smith's Lead. Cas. (7th Am. ed.) 177, and cases cited in note to that case.

GALVIN v. BACON.

[11 MAINE, 28.]

DEMAND, WHEN REQUIRED.—A party rightfully in possession of property belonging to another, does not unlawfully detain it, until after a demand by the true owner, and a refusal to deliver the possession.

WHERE THE TAKING OF THE PROPERTY IS TORTIOUS, no demand is necessary.

WHOEVER TAKES THE PROPERTY of another, without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in law, tortiously.

POSSESSION OF PROPERTY ACQUIRED by a person purchasing from a bailee, who has no authority to sell, is tortious, and the owner may maintain replevin therefor without demand or notice.

REPLEVIN for a horse. Plaintiff, being the owner of the horse, delivered him to one Staples, to be used by him for a limited period, with the expectation of a purchase by him. Staples sold him to one Scott, and he to McAllister, and he to the defendant, all of whom purchased *bona fide*, for a valuable consideration, without notice of any claim or interest in the plaintiff to said horse, and each of whom received the possession thereof from his vendor respectively. No demand was proved to have been made by plaintiff on defendant for the horse prior to the bringing

of this action. The court ruled that no demand was necessary. Verdict for plaintiff.

A. G. Chandler, for the defendant.

Downes, for the plaintiff.

By Court, *Wesron*, J. Where a party is rightfully in possession of property belonging to another, he does not unlawfully detain it, until after a demand by the true owner and a refusal. But if the taking is tortious, no such demand is necessary. This is a principle uniformly applied in actions of trover. In *Gates v. Gates*, 15 Mass. 311, and in *Seaver v. Dingley*, 4 Greenl. 306, the same rule is understood to apply in cases of replevin. In some other cases cited, as in *Hussey et al. v. Thornton et al.*, 4 Mass. 405 [3 Am. Dec. 224], and in *Marston v. Baldwin*, 17 Id. 606, this point does not appear to have been taken.

It is assumed in argument, on the part of the counsel for the defendant, that his possession was lawful, and that a demand was necessary by the plaintiff, to enable him to maintain replevin. And if his premises are correct, he is sustained in this position by some of the cases cited. The possession of the defendant did not subject him to the imputation of anything morally wrong. He acted in good faith, having purchased of one whom he supposed to have been the rightful owner; as did two others, who successively purchased and sold the horse in question. But their supposition did not accord with the fact. The horse was from the beginning the property of the plaintiff, and he had never authorized either of these sales.

Whoever takes the property of another, without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner, and he could convey none to another. The purchaser is not liable to be charged criminally, because innocent of any intentional wrong; but the owner may avail himself against him of all civil remedies provided by law for the protection of property. If the bailee of property for a special purpose, sells it without

right, the purchaser does not thereby acquire a lawful title or possession.

In the case before us, Staples was rightfully in possession of the horse, but he had no right to sell him; if he had, the plaintiff would, upon the sale, have ceased to be the owner, which has been negatived by the verdict. It does not follow because his possession was rightful, that those who hold under him are also lawfully in possession. Indeed, the very reverse is true. Staples had the horse by the assent of the owner, but he sold him in his own wrong, and in violation of the rights of the plaintiff. The defendant came honestly by the horse, but he did not receive possession of him from any one authorized to give it, and is therefore liable *civilliter* to the true owner, for the taking as well as for the detention.

Judgment on the verdict.

DEMAND BY AN OBLIGEE who is entitled to the delivery of property under a contract, when necessary: *Chambers v. Winn*, 2 Am. Dec. 713; *Mitchell v. Gregory*, 4 Id. 655; *Higgins v. Emmons*, 13 Id. 41.

OFFICER ATTACHING THE PROPERTY OF A STRANGER TO THE WRIT is liable in trover, though no demand for its release or return is made: *Woodbury v. Long*, 19 Id. 345; *Jamison v. Hendricks*, 18 Id. 131; *Owings v. Frier*, 12 Id. 393, and note.

PURCHASER FROM ONE WHO HAS NO AUTHORITY to sell acquires no property, although the purchase is *bona fide*. See the note to *Williams v. Merle*, *post*.

MARSHALL v. JONES.

[11 MAINE, 54.]

NON-JOINDER.—Under the general issue in *assumpsit*, defendant may show that there are other persons jointly interested with the plaintiff in the cause of action sued on, and it is not necessary to plead such matter in abatement.

WHERE THERE IS A SPECIAL CONTRACT, the plaintiff can not recover in *indebitatus assumpsit* the contract price, unless there has been a complete performance on his part, nor if by such recovery the terms of the contract would be violated.

WHERE ASSUMPSIT IS BROUGHT to recover the value of work performed in pursuance of a special contract, the defendant may introduce such contract in evidence to show that plaintiff has not complied with its terms, or that the defendant is liable to others as well as the plaintiff for the work performed, or that the parties have agreed upon the rule of damages for failure to comply with the terms of the contract.

INDEBITATUS ASSUMPSIT by Marshall for the building of a ship for Jones. Plaintiff produced a witness who testified that he

worked in plaintiff's ship-yard on the ship built for the defendant; that plaintiff employed him and paid him his wages, except twelve dollars paid by one Winslow; that he had heard plaintiff say, that Winslow and he, plaintiff, built the ship together; that the ship was about two hundred and fifty tons, and it was worth twelve dollars per ton to build her. Plaintiff also produced one Sibley, who testified that he was present at a conversation between plaintiff and defendant, and that they talked of settling the claim sued for in this action; that no mention was made of Winslow's name, and that defendant offered to pay the plaintiff for the ship by giving his notes, which plaintiff refused to take. Defendant produced a written contract, dated August 23, 1828, signed by plaintiff and one Abner Winslow on the one part, and by Francis Jones & Co. of the other part, for building a ship similar in its description to the one built; also a subsequent contract, modifying the first one. The contracts were objected to, because defendant had never performed his part of the contract by paying for the ship, and the work having been done by plaintiff, and defendant having received the ship, he was bound to pay for it in the same as though there had been no written contract. It was stated by defendant's counsel in the opening of the defense, that plaintiff and Winslow had formerly commenced an action against Jones & Co. in the province of New Brunswick, which was carried to the superior court, and then settled by Winslow. The court instructed the jury that if Winslow was jointly concerned with the plaintiff in building the vessel, he should have been joined, and that the action could not be maintained in the name of plaintiff alone, unless there had been a severance of the plaintiff's claim from their joint claim by a settlement between the defendant and Winslow of Winslow's part; that how the suit brought by Marshall and Winslow had been disposed of did not appear; that the offer on the part of defendant, as testified to by Sibley, to give his notes to plaintiff in payment, was not a severance of the cause of action, if made as an offer of compromise. Verdict for defendant, subject to the opinion of the court as to the correctness of such instructions.

Allen, for the plaintiff.

Hobbs, *contra*.

By Court, PARRIS, J. It is competent for a defendant, in an action founded upon contract, to show in defense that there are other persons than the plaintiff interested in the subject-matter

in litigation, and who ought to be joined as plaintiffs in the suit. It is not necessary to plead such matter in abatement, but it will defeat the action if proved, as it may be, under the general issue, in any stage of the proceedings. The plaintiff has declared in general *indebitatus assumpsit* for money had and received, work and labor performed, and money paid, laid out, and expended.

No proof was offered in support of the first and third counts, and the only proof introduced by the plaintiff in support of the second count, for work and labor, was the testimony of a witness who labored in a ship-yard on a vessel built by the plaintiff, and who testified that the plaintiff appeared to have the sole control of the yard. This vessel the defendant received, and, as he contends, under a written contract made with the plaintiff and one Abner Winslow, and that if he is answerable at all, it is under the contract, and not on a general count for work and labor; it is to Marshall and Winslow jointly, and not to the plaintiff.

To prove that Winslow ought to have been joined as plaintiff, the defendant offered the written contract which purported to be executed by the plaintiff and Winslow on the one part, and by the defendant on the other, for building a vessel similar to the one which was built; and also another contract signed subsequently by the same parties, containing some modifications of the former contract. It also appeared from the testimony of the plaintiff's witness that he received some pay for his labor from Winslow, who was often in the yard; and that both Winslow and the plaintiff said frequently that they built the vessel together. The plaintiff contends that, inasmuch as the defendant has not fulfilled the written contract on his part by paying for the vessel, he can not make use of it in defense.

But we are not aware of any principle or authority by which such a position can be sustained. The parties, having entered into a special contract, are to be governed by it, and the law will enforce its execution, and look to it for the rule of damages in case either party fail to fulfill it. Where the terms of the special contract are performed, general *indebitatus assumpsit* will perhaps lie, but the special contract is not thereby necessarily excluded. If by that the damages are stipulated, the law will hold the parties to their own estimate. The special contract is not to be infringed by a resort to the general counts. The defendant may use it to show that the plaintiff has not performed the contract on his part, and thereby defeat the action on the

general count. He may use it to show that he is liable to others as well as the plaintiff for the damages sought to be recovered, and thereby defeat the action for want of proper parties; or he may introduce it as evidence that the parties have agreed upon the rule of damages, and thereby prevent the recovery of any greater sum than that specified in the contract. Where there is a special contract, the plaintiff can not recover in *indebitatus assumpsit*, the stipulated price, unless there has been a complete performance on his part; nor then, if by such recovery the terms of the contract would be infringed.

The ruling of the judge in receiving the written contract as evidence was undoubtedly correct; and by that contract, as well as by the testimony of the plaintiff's witness, it is manifest that Winslow was jointly interested with the plaintiff, and ought to have been joined, unless there had been a severance of the plaintiff's claim from the joint claim by a settlement between the defendant and Winslow of Winslow's part. Of that there was no evidence. The plaintiff's statement on the trial, that he and Winslow had formerly commenced an action against the defendant in the province of New Brunswick, shows that the claim was then considered joint, and that it was necessary to prosecute in the name of both, and the additional statement that the action was settled by Winslow with the defendant, if proved, would not amount to a severance, unless it appeared further that the defendant paid Winslow his share of the demand only, and that the balance, to which the plaintiff was entitled, remained unpaid. The case does not show that to have been the fact. The offer to settle, while the defendant was under arrest on mesne process in this action, is no evidence of severance. It does not appear that he knew that the suit was in the name of the plaintiff alone; and if he did, the offer on his part is to be regarded as a proposition to buy his peace, and not to be used as evidence in determining his legal rights.

There must be judgment on the verdict.

QUANTUM MERUIT UNDER SPECIAL CONTRACT.—This subject is considered at length in the note to *Hayward v. Leonard*, 19 Am. Dec. 272. See also *Cauton v. Burke*, 18 Id. 297, and note.

MARSHALL v. WINNLOW.

[11 MAINE, 68.]

ASSUMPSIT MAY BE MAINTAINED by one part owner of a ship against another, to recover the excess contributed by him in building the ship, over and above his share, although there has been no liquidation of their accounts, nor balance ascertained, nor any express promise to pay such excess.

ASSUMPSIT. Verdict was returned for plaintiff. The other facts are stated in the opinion.

Downes and Hobbs, for the defendant.

Allen, for the plaintiff.

By Court, PARKER, J. The parties in this case were jointly interested in building a brig, and the plaintiff, having advanced beyond his proportion, brings his action of assumpsit for contribution. The defendant resists on the ground that in the transaction out of which the demand arose they were partners, and that, inasmuch as prior to the bringing of the action there had been no liquidation of their accounts, nor any balance ascertained, nor any express promise to pay such balance as might be found due, assumpsit can not be maintained.

Such, no doubt, is the law where the claim arises out of partnership transactions, and in relation to partnership concerns; as where two persons engage in business under a contract to share in the profit and loss arising from such connection, assumpsit will not lie in favor of one partner against the other on an implied promise, except for a liquidated balance either struck by the parties, or the result of a final adjustment of the partnership concerns. But notwithstanding their association as partners, they may, in their private and individual character, contract with each other in relation to concerns not the subject-matter of the partnership, in the same manner as if such partnership had never existed. In the case at bar, if there were any partnership, it was confined exclusively to the brig. She was to form the common stock or capital, to constitute which, both parties were to contribute a certain proportion. What that proportion was, it is immaterial to inquire, as the case finds that the plaintiff did in fact advance more than his proportion. If, then, we view it as a partnership, it is a case of two persons agreeing to furnish a common stock, and on the failure of one to advance his share, the deficiency is on his account supplied by the other. It is not a question concerning the division of the stock, or the profits arising from the opera-

tions of the company, and consequently the principles of law relating to the division of partnership effects, and the rights of partners *inter se*, do not apply. No liquidation could be necessary. Whether the concern in which they were engaged should be a profitable or a losing business, would be a fact in no way affecting the plaintiff's rights. The profit or the loss could not be ascertained until the capital had been supplied. That, by mutual agreement, was to be furnished in proportion to the parties' interest when the vessel should be completed, and whenever one party failed to supply his proportion of the capital necessary to the carrying forward of the work, the other must necessarily furnish it, or the whole would be suspended. The amount, thus supplied, would be certain, depending on no contingency arising in the prosecution of the business, or the employment or sale of the vessel, and, of course, the plaintiff's right to remuneration would be immediate, not liable to be postponed to the completion of the vessel, or to be defeated by any casualty. Suppose she had been accidentally destroyed by fire, so that the whole expenditure was a total loss, could the defendant avoid refunding his proportion of the amount expended?

If a copartnership be by deed, and the partners covenant each to advance a stipulated sum, as capital, for the purpose of launching the partnership, an action to enforce payment will lie by one partner against the other who fails to make the advance, and the sum agreed upon will be the measure of damages: *Vening v. Leckie*, 13 East, 7; *Gow on Part.* 106, Am. ed. But when the contract of partnership is verbal, as it may be, or by writing not under seal, it can not be enforced by action of covenant. In such cases, the remedy can be only in assumpsit, and it is advanced as an indisputable proposition by *Gow* in his treatise on the law of partnership, that in whatever instances an action of covenant is maintainable for the breach of a covenant comprised in a deed of copartnership, in the same instances an action of assumpsit can be sustained if the partnership, instead of being constituted by deed, were contracted verbally or by writing only; and he gives an illustration of the principle by stating a case somewhat similar to the one before us. If two persons agree, in writing, to share the profit or loss upon goods bought by one of them on their joint account, an action of assumpsit may be maintained, founded on the agreement, by the one against the other for the payment of his proportion of the original purchase, because until that is paid there can not

be any account of profit and loss between them. It is further said, by Gow, that in an action of assumpsit for money paid to the use of his copartner, one partner may enforce contribution from him in a case in which he has solely discharged a demand to which himself and his copartners were jointly liable. Now, whether the plaintiff and defendant were interested in the brig as copartners or tenants in common, is immaterial to the decision of this case. In either view, the advances by the plaintiff beyond his proportion, as determined by the agreement of the parties, were made for the use and benefit of the defendant, and the law raises the promise of payment.

There must be judgment on the verdict.

ACTIONS BETWEEN PARTNERS.—See *Cowles v. Prince*, 12 Am. Dec. 642, note and cases there cited.

ADAMS v. ROWE.

[11 MAINE, 89.]

SCIRE FACIAS IS NOT PROPERLY THE COMMENCEMENT of a new action, but the continuation of an action already commenced, whenever it is used to carry into effect a former judgment against a party to it.

SCIRE FACIAS AGAINST BAIL IS THE COMMENCEMENT of a new action, because it issues against a person, who was no party to the record in the original action.

SCIRE FACIAS AGAINST ONE WHO HAS BEEN CHARGED AS A TRUSTEE in a process of foreign attachment, is not the beginning of a new, but the continuation of the original action.

WHERE THE DEFENDANT IN AN ACTION was personally served and suffered default, being at the time subject to the jurisdiction of the court, and subsequently a writ of *scire facias* was issued to give effect to such judgment, and served upon him, by leaving it at his last place of abode, he having in the mean time removed out of the jurisdiction of the court, such service is sufficient to give the court jurisdiction of the defendant in such *scire facias* proceeding.

A JUDGMENT RENDERED IN SUCH PROCEEDING is not open to examination in the courts of the state to which the defendant has removed, when it is attempted to be enforced against him by suit in those courts.

DEBT on a judgment. The following agreed case was stated for the opinion of the court. At the court of common pleas, held at Boston, July, 1829, Adams recovered judgment against one Henry J. Benson, as principal, and against his goods, effects, and credits in the hands of Rowe, as his trustee, Rowe at the time residing in Boston, and the service of the writ being on him personally. Judgment was rendered by default. *Kzeou*

tion was issued, and a return of *nulla bona* and *non est inventus* was made to the court at the October term, 1829. Within a year thereafter, Adams sued out his writ of *scire facias* against Rowe, and the officer returned thereon that he had summoned the defendant, "by leaving an attested copy of the writ at the last and usual place of abode of said Rowe in Boston." Prior to such service, Rowe had removed to this state, where he had resided ever since. Judgment was again rendered against Rowe by default, and such judgment forms the basis of the present action. Rowe had no actual notice of the *scire facias* proceedings against him until after judgment had been rendered therein. A nonsuit or default was to be entered according to the opinion of the court.

Rogers, for the defendant, cited the following statutes of Massachusetts: Statutes 1795, c. 64, secs. 6, 7; 1798, c. 50, secs. 1, 2, 3; statutes passed March 2, 1829; also second section of the stat. of Maine, c. 59; and *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]; *Hall v. Williams*, 6 Pick. 232 [17 Am. Dec. 856]

Pond, *contra*, cited *Peck v. Warren*, 8 Pick. 163; *Mitchell v. Osgood*, 4 Greenl. 132.

By Court, MELLER, C. J. As Rowe was an inhabitant of Boston when the original action was commenced against Benson and the defendant, as his trustee, and as he was served personally with an attested copy of the process, the court of Massachusetts had jurisdiction of the cause, and over both the defendants; at least so far as that the default of each was properly entered, and both the judgments thereon were correctly rendered, and, to all legal purposes, binding on both, in this state as well as in Massachusetts. But as to the present defendant, the default entered and the consequent judgment against the goods and chattels, rights and credits of Benson in his hands and possession, did not expose him to any liability to pay any sum whatever to the plaintiff; for if he had been actually notified and accordingly appeared and answered to the *scire facias*, and disclosed on oath as by law prescribed, and on his disclosure the court had adjudged him not the trustee of Benson when the original process was served upon him, he would have been at once discharged by the court; and the only consequence of his neglect to appear and disclose on the original process, instead of being defaulted, would have been that he could not have recovered any costs. On examination of the several acts of Massachusetts, relating to the service of writs of *scire facias* which have

been introduced and commented upon in the argument, we are not disposed to doubt (were it our province to inquire) that the service of the *scire facias* in the present case was regular, as it appeared on the officer's return; and authorized the court there to render the judgment on which the plaintiff has declared. The important and interesting question is, "What is the character of that judgment in this state, as to its conclusiveness on the defendant and upon the court in this state, where the plaintiff is seeking its enforcement?" It appears that the defendant removed from Massachusetts and became a permanent inhabitant of Maine some time before the writ of *scire facias* was sued out, and has continued such to this time; and never had any notice of the existence of such suit on the *scire facias*, or of the judgment therein rendered against him, till some time subsequent to its rendition.

If the judgment declared on had been rendered against the defendant in a common action, in which he had been sued as the debtor of the plaintiff, instead of the debtor of Benson, it is perfectly clear that, according to the decisions in *Bissell v. Briggs* [6 Am. Dec. 88], and *Hall et al. v. Williams et al.* [17 Am. Dec. 356], cited at the argument, the judgment would be open to examination in our courts, as much as the demand on which the judgment was founded, would be. It would not have the sanctity of a judgment, and thus conclude the defendant as to his rights. The case of *Bissell v. Briggs* was decided many years since, and prior to our separation from Massachusetts, and has ever been considered in this state as reposing on the soundest principles, and sustained by unanswerable arguments. And the case of *Hall et al. v. Williams et al.* was decided on the same principles, after a full and learned investigation of the subject, and a review of the principal authorities having a bearing upon it. The only question of any importance in the cause is, whether the action on *scire facias* is to be considered as an exception, and not subject to the operation of the doctrine established by the foregoing decisions; or, in other words, was the *scire facias* to be considered as a new action, or a continuation of the original suit, and as constituting a necessary part of it? If it was, it would seem that this action is maintainable, because the court of Massachusetts had unquestionable jurisdiction of that suit. In 6 Dane Abr. 463, the learned author says, that a *scire facias* is not properly an action, but a mere continuation of an action, whenever it is used to carry into effect a former judgment against a party to it; and it

differs from *scire facias* against bail; that, he observes, is a new action. He states no other *scire facias* as an exception. Bail are sureties for the defendant, in the same manner as the indorser of a writ is a surety for the plaintiff. In both cases, however, their suretyship is of a conditional character. In certain events each may be liable to pay a sum of money recovered by one party against the other, but, in other respects, they have no immediate connection with the original action. The *scire facias* against bail and against the indorser of a writ is properly considered as a new action; in each case it issues against a person who was no party to the record in the original action.

In the case before us, Rowe was a party to the action when the same was commenced; the judgment entered on his first default, was indefinite, incomplete, and in no respect conclusive upon him, except as to costs. The statute has therefore made provision for furnishing the creditor with further process, for ascertaining the plaintiff's rights and the defendant's liabilities, and thus preparing the way for his obtaining final process, to compel payment of whatever sum the court shall adjudge to be in his hands and possession as the trustee of the principal debtor. When the defendant submitted to the first default, he knew that he was thereby subjected to no liabilities to the plaintiff; he knew that there must be further proceedings in court, in which he was to bear a part, in making his disclosure and discharging himself on oath, or else that the plaintiff would avail himself, on his default, of all the expected advantages from the institution of proceedings against him; he knew that his own conduct had rendered a *scire facias* necessary to a final decision of the cause against him. He knew, when he removed from Massachusetts into this state, that legal process from the court in Massachusetts could not run into Maine; of course, that there could be no service of the *scire facias* upon him personally, or in any other manner than by a copy of it left at his last and usual place of abode in Boston, according to the law of Massachusetts. He knew that if he had no goods, effects, or credits of Benson in his hands when the process was served on him personally in Boston, it was important for him to disclose that fact on the *scire facias*, and thus protect himself from all danger consequent upon his first default. He must be presumed to have known that the *scire facias* would necessarily issue from the court in Massachusetts, and that no service of the writ could be made upon him in this state, but only by leaving

a copy at his last and usual place of abode in Boston, as we have before mentioned. Considering the peculiar nature of our trustee process, must not the *scire facias*, which the statute has provided, be considered as a part, and a very essential part, of the original action, and a continuation of it for the purposes we have been considering? It is true that the statute provides for a service of the *scire facias* on the defendant in the same manner as for that of the original process, so that he may know when and where he must appear and disclose; but it is very evident that its provisions are predicated on the idea that the party summoned continues within the jurisdiction of the court, where legal service may be made upon him. No provision is made for a service upon him, if he should remove from the state in the manner the defendant did.

Our construction of the act must be such, if possible, as to give operation and effect to all parts of it, and preserve and protect the rights of all concerned; for such must have been the intention of the legislature which framed and passed the act. Now, as the defendant was in the first instance personally notified to answer and disclose before the court, the facts as to his being the trustee of Benson, as alleged in the writ, as he did not appear at the first term, but was defaulted, thereby declaring that he intended to make his disclosure on the *scire facias*; and as he removed without the jurisdiction of the court, before the *scire facias* was issued, so that it could not be legally served upon him in this state; must he not be considered as having agreed to take notice of such a service as could be made, and was made, in Massachusetts, by leaving a copy of the writ in Boston, where he had his last place of abode; and that, whatever inconvenience he has suffered, must it not be imputed to his inattention to his own interest in not leaving an agent in Boston, with whom a copy of the writ could have been left, and notifying the plaintiff of the same? No one will deny the right of the defendant to remove, as he did, from Massachusetts; but if by so doing, he could, and did at once relieve himself from accountability, and dissolve the lien on the property in his hands, created by the service of the original process, the effect was certainly a singular one; and to sanction such a principle, would often produce direct injustice and destruction of a creditor's rights, and lead to the practice of innumerable frauds with perfect impunity. For we are not aware how such a consequence can be prevented, but by considering the jurisdiction of Massachusetts, which had once fully attached, as still con-

tinuing, on the principle that the *scire facias* is an incident to, or a part and continuation of the original process. It has been said, however, that though it is not such, still the court of Massachusetts might have had jurisdiction, in respect to the *scire facias*, and rendered the judgment which they did render, so as to be conclusive upon the defendant in this action, provided actual notice had been given to him in the manner provided by the act of 1829. True, it might have been binding on him, had the present action been brought in Massachusetts, and personal service been made there. So it would be, as the *scire facias* was served.

If the court in that state had jurisdiction of the whole cause, the service made was sufficient, in our opinion, for the reasons we have given. If the court had no jurisdiction over the defendant, of what use could personal notice, served upon him in this state, have been? He had no property in Massachusetts; now, if Massachusetts had no jurisdiction over any of the defendant's property, nor over his person, how could personal notice, served on him in this state, give any jurisdiction to that state, or enable its courts to render a judgment binding on him here. The answer is plain. Surely our courts can not render a legal judgment against a citizen of Louisiana, who has no property in this state, merely serving a summons upon him in Louisiana. Whether the defendant could have discharged himself on oath, had he appeared on the *scire facias*, we have no means of knowing. If he can not avail himself of the defense to the present action, which has been urged, it does not follow that he might not have found relief by application to the proper tribunal in Massachusetts. This he has declined doing, for reasons which were satisfactory to himself.

We place the decision of this cause upon those provisions and principles of our trustee act, which are of so peculiar a character, as when applied to such a case as the one under consideration, must place it out of the reach and influence of the doctrine established in the cases above cited; and for the reasons we have assigned, that decision is in favor of the plaintiff. Accordingly a default must be entered.

CASES

OF THE

COURT OF APPEALS

OF

MARYLAND.

SASSOCH v. WALKER'S EX'RS.

[5 GILL & JOHNSON, 102.]

THERE IS NO DEPARTURE IN PLEADING where the plaintiffs suing on an appeal bond describe themselves in the writ, which is in the *definet* only, as "executors of," etc., and in the declaration which recites the writ, as "the said plaintiffs," and again describe themselves in the replication as "executors of," etc., and in their demurrer to the defendant's rejoinder, as "the said plaintiffs."

ADDITION OF THE WORD "EXECUTORS" IS MERE SURPLUSAGE, and not an irregularity in the writ, etc., where the plaintiffs are suing on an appeal bond given to them as executors, upon which they can maintain an action only in their individual capacity, the demand being the same.

OBJECTION THAT THE WRIT IS IN THE DEFINET ONLY, where the plaintiff sues on a contract in his own right, can not be raised on general demurrer since the statute of 4 and 5 Anne, c. 16.

EXECUTOR MAY SUE IN HIS REPRESENTATIVE CAPACITY whenever the money, if recovered, would be assets in his hands.

EXECUTORS MAY SUE AS SUCH ON AN APPEAL BOND given to them as executors, on appeal from a judgment recovered by them in that character, because the money, if recovered, would be assets.

TO ENTITLE THE APPELLEE TO SUE ON AN APPEAL BOND, the issuance of a *f. fa.* or *vend. ex.* is unnecessary.

MERE TAKING OF PROPERTY UNDER A FL. FA. IS NOT A SATISFACTION, and the plaintiff may, without impairing his right, countermand the *vend. ex.*, and restore the property at the debtor's instance, and for his accommodation, without payment.

RIGHT TO SUE ON AN APPEAL BOND AFTER AFFIRMANCE of the judgment, is not impaired by the return of a *f. fa.* on the judgment "not sold for want of bidders," and the issuance and return of a *vend. ex.* "not sold by order of the plaintiffs."

ENTRY OF FINAL JUDGMENT WITHOUT SWEARING A JURY OF INQUIRY to assess the damages in an action on appeal bond, on overruling a demur-

rer to the defendant's rejoinder to the replication assigning breaches, is erroneous.

IF SUCH POINT OR QUESTION WAS NOT PRESENTED to, or decided by, the court below, the judgment will not be reversed for such error, under the statute of 1825, c. 117, sec. 1.

QUESTION MAY BE PRESENTED BY A MOTION IN ARREST of judgment.

APPEAL from the county court in an action of debt on an appeal bond. The case was: The appellees, as executors of William Walker, having recovered judgment in the county court against one Kemp, an appeal was taken to this court, Sasscer, the present appellant, becoming Kemp's surety on the appeal bond. The judgment was affirmed by the court, and a *f. fa.* issued and returned "levied as per schedule, and not sold for want of bidders." A *vend. ex.* was then issued and returned "not sold by order of the plaintiffs." The present action was then brought on the appeal bond against Kemp and Sasscer. The writ was in the *detinet* only, and styled the plaintiffs "executors of the testament and last will of William Walker, deceased." The declaration recited the writ, and, without naming the plaintiffs, described them only as "the said plaintiffs." The replication to the defendants' plea of performance, assigned breaches, and described the plaintiffs as "executors, etc." The defendants in their rejoinder pleaded in bar the issuance of the *f. fa.* and *vend. ex.* above mentioned, and the returns of the sheriff thereon. General demurrer to the rejoinder and judgment thereon for the plaintiffs, from which Sasscer appealed. The points relied on to reverse the judgment appear from the opinion.

Mundell and Stonestreet, for the appellant.

A. C. Magruder, for the appellees.

By Court, BUCHANAN, O. J. The record submitted to us presents this case: *vide* statement. Which, then, committed the first fault in pleading, is an inquiry thrown upon us by the demurrer.

The appellees being styled in the writ, "executors of William Walker," and merely called in the declaration (after reciting the writ), "the said plaintiffs," the words "the said plaintiffs," in the declaration, must be understood as having reference to the plaintiffs, as described in the writ, and to mean the plaintiffs, executors of William Walker; and being called in the replication throughout "executors of William Walker," and in the demurrer "the said plaintiffs," as in the declaration, which must

be understood in the same manner as the declaration, there is perfect correspondence between the writ, declaration, replication, and demurrer; and if the appeal bond, on which the suit was brought, and which was given to them as executors on the appeal from the judgment obtained by them in that character against Kemp, was a contract on which they could sustain an action only in their individual, and not in their representative capacity, then the addition of the word "executors" in the writ, etc., might be construed and treated as a superfluous description, and not irregular, the demand being the same: 1 Chit. Pl. 253; *Lloyd v. Williams*, 2 Wm. Bl. 722; *Rogers v. Jenkins*, 1 Bos. & Pul. 383, 384; *King and others v. Thorn*, 1 T. R. 266, 488; 1 Vern. 119; 6 Com. Dig. 307, tit. Pleader. And though where a plaintiff sues on a contract in his own right, if the writ be in the *detinet* only, it is irregular, yet since the statute 4 and 5 Anne, 16, it can not be taken advantage of on a general demurrer: 6 Com. Dig. 306, tit. Pleader. The appellees, however, were not bound to sue in their individual character, but had a right to sue in either their individual or representative capacity. Wherever the money when recovered would be assets in the hands of the executor, he may sue in his representative capacity: 5 Co. 81; *King and others v. Thorn*, 1 T. R. 265, 487.

In *Hosier v. Lord Arundel*, 8 Bos. & Pul. 7, decided in the year 1802, a different notion seems to have been entertained; but afterwards, in the year 1805, in *Cowell and wife v. Watts*, 6 East, 405, the court of king's bench returned to the old rule, "that where money, when recovered, would be assets, the executor may declare for it in his representative character," accompanied by an expression of regret that it had ever been departed from. And the same rule is recognized and treated as settled law, in 1 Saund. Pl. and Ev. 610, etc.

The bond upon which this suit was brought being given to the appellees as the executors of William Walker's will, on an appeal from a judgment obtained by them in that character against Kemp, the money when recovered will be assets in their hands. They had a right, therefore, to sue in their representative capacity; and considering this suit as brought in that character, it was properly brought.

We come then to the rejoinder, the matter of which is clearly no sufficient bar to the action. Every word of it may be true, and which the demurrer admits, and yet the appellees be entitled to recover. They were under no obligation to entitle

them to proceed upon the appeal bond, to have issued a *feri facias*, or *venditioni exponas*; and when issued, there was nothing to prevent their countermanding either of them without impairing their right to put the appeal bond in suit.

The mere taking the property under the *feri facias* was not itself equivalent to payment, and did not amount to a satisfaction of the judgment. The plaintiff might have countermanded the *venditioni exponas*, and restored the property at the instance and for the accommodation of the defendant in the judgment, without having received payment of or satisfaction for any part of it; and no payment, satisfaction, or discharge is alleged in the rejoinder, which is no answer to the replication assigning the breaches of the condition of the bond; which was that Kemp, the defendant in the judgment appealed from, should prosecute the appeal with effect, and in case the judgment should be affirmed, pay to the appellees, executors, etc., the debt, damages, etc. The condition of the bond, as the rejoinder admits, was not performed. The appeal was not prosecuted with effect, and the return of the sheriff did not amount to a payment and satisfaction of the judgment according to the condition of the bond, and is not pleaded as such. If the appellees had taken issue on the rejoinder, the only matter referred to the jury would have been whether a *feri facias* and *venditioni exponas* were issued and returned as alleged in the rejoinder, which may well have been, yet the judgment remained altogether unsatisfied either in fact or in contemplation of law. The demurrer, therefore, to the rejoinder in this case was properly sustained. In *Southcole v. Braithwaite*, 1 T. R. 624, it was decided that bail in error could not surrender the principal, but were liable at all events, in case the judgment was affirmed, and not entitled to be relieved, though the principal became bankrupt pending the writ of error.

And in *Perkins v. Pettit and Yale*, 2 Bos. & Pul. 440, which was a much stronger case than this, it was held upon general demurrer to be perfectly clear that if a defendant in error, upon the judgment being affirmed, take into execution the body of the plaintiff in error for the debt, damages, and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognizance.

But instead of swearing a jury of inquiry, which should have been done, on the demurrer to the rejoinder being ruled good, the court below proceeded to enter up a final judgment

for the appellees (the plaintiffs there), which is clearly an error, for which the judgment would be reversed were we not restrained by the act of 1825, c. 117, sec. 1, which provides that "the court of appeals shall not reverse any judgment on any point or question which shall not appear to have been presented to the county court, and upon which that court may have rendered judgment." And it does not appear that any point or question relating to or involved in the final judgment was presented and decided by the county court. It is not like the case of *Charlotte Hall School v. Greenwell*, 4 Gill & Johns. 407, where there was a motion in arrest of judgment, which presented to the court the question whether any judgment should be rendered.

Judgment affirmed.

SUITS BY EXECUTORS AND ADMINISTRATORS.—Where the nature of a debt originally due an intestate is changed by contract with the administrator, the latter must sue for the new debt in his own name; and where the plaintiff styles himself administrator in a declaration on a note, but takes judgment in his own name, such designation will be deemed merely *descriptio personae*: *Helm v. Van Fleet*, 12 Am. Dec. 248. An executor need not sue as such on a contract made with him as executor after the testator's death, and if he does so, he need not prove that he is executor: *Hunter v. Postlethwaite*, 13 Id. 334. A note executed to A., as administrator of B., is, for most purposes, considered a note to A., and he may sue on it in his own name: *Sanders v. Blain's Adm'rs*, 22 Id. 86. On a bond made payable to A., as executor of B., the representatives of A. may sue, after B.'s death, not those of B.: *Horstons v. Williamson*, 4 Id. 703.

POINT NOT PASSED ON BELOW NOT REVIEWABLE.—In *Cockey v. Ensor*, 43 Md. 268, 267, it is held, citing the principal case, that on appeal from the overruling of a motion to quash an execution and to set aside the judgment, where it does not appear from the record that any reasons were assigned, or ground stated to the court below in support of the motion, the appellate court will not review the decision; but that it is otherwise where a motion in arrest of judgment is overruled.

ISSUANCE OF EXECUTION, BEFORE SUING ON AN APPEAL BOND, is held unnecessary, on the authority of *Sasscer v. Walker's Ex'rs*, in *Fiscot v. Darling*, 9 Cal. 285.

HYATT v. BOYLE.

[5 GILL & JOHNSON, 110.]

SELLER OF PERSONAL PROPERTY IS NOT LIABLE FOR DEFECTS in its quality or condition, as a general rule, without an express warranty or fraud.

SALE OF TOBACCO AS BEING OF "PARKIN'S CROOKED BRAND," imports no warranty as to the quality of the tobacco, further than that it is of that brand, and though the purchaser agrees to pay the full price of a merchantable commodity, he can not, on discovering it to be unsound and

unmerchantable, offer to return it and resist an action for the price, if the tobacco is of the stipulated brand, and there is no express warranty, or knowledge of the unsoundness by the vendor.

DELIVERY OF ANY TOBACCO NOT OF THAT BRAND, however excellent its quality, would not, in such a case, be a compliance with the terms of sale.

EXCEPTION THAT WHERE THERE IS NO OPPORTUNITY FOR INSPECTION of an article by the buyer, there is an implied warranty of its quality, applies only where the inspection is, morally speaking, impracticable, as where goods are sold before arrival or landing.

THAT THE INSPECTION WOULD BE INCONVENIENT or difficult, is not sufficient in such a case.

KNOWLEDGE BY THE VENDOR THAT TOBACCO IS BOUGHT FOR SALE, imports no warranty, it seems, that it is suitable for that purpose, where the tobacco is of the particular brand which the vendee contracted to purchase.

SCIENTER OF THE VENDOR IS IMMATERIAL when there is an express warranty of the goods, and an offer to return them in due time after discovering their unsoundness.

CASE OF OSOOD V. LEWIS, 2 Har. & G. 295 [18 Am. Dec. 317], explained.

APPEAL from the Baltimore county court in an action of assumpsit brought by the appellee against the appellant and another, merchants, trading under the firm of Seth Hyatt & Co., the appellant only being served, in which non-assumpsit was pleaded. The action was for the price of certain tobacco sold by the plaintiff to the defendants. The tobacco was described in the bill of parcels as "twenty-four kegs tobacco branded 'Parkin.'" It appeared that the article referred to was known as "Parkin's crooked brand" of tobacco, a merchantable commodity well known among merchants, and considered a favorite brand, usually varying in price from eight to thirteen and one half cents per pound, according to quality, the price agreed to be paid in this instance being a full price for the first quality. It was sold in kegs, and there was no examination of it by either party at the time of the sale. The plaintiff had received it for sale on commission, and had frequently sold tobacco of the same brand, and had never heard any complaint from purchasers. The tobacco delivered was "Parkin's crooked brand." Some sixty days after the delivery, the defendants sold one keg of it, and the purchaser opened it in the middle and found it rotten, unsound, and unmerchantable, and refused to take it. Two other kegs were then opened and found to be in a similar condition. The plaintiff having drawn on the defendants for the price, they declined to pay, alleging, as a reason, that the tobacco was injured. There was also some evidence of an offer to return the tobacco, though there was some conflict on this point. Six months afterwards another keg was opened in the

presence of the plaintiff, and proved to be tolerably good. The defendants then offered to have all the rest opened and pay for that which was merchantable, and return the rest, which the plaintiff refused. None of the tobacco had been sold by the defendants, and only the four kegs mentioned had been examined.

There was no evidence that the plaintiff knew of the unsound condition of the tobacco, or that there was any fraud or express warranty on his part. When received, it appeared to be in good order, and the defendants kept it in a dry warehouse. The judge instructed the jury that though they might be of the opinion that there was an offer to return the tobacco, yet as no warranty was proved, the plaintiff was entitled to recover; and that even if the contract contained a warranty, it was no defense in an action to recover the value of the goods sold, unless the defendants offered to return the goods in a reasonable time, and the plaintiff knew of the unsoundness of the article; and directed the jury that the plaintiff was entitled to recover the full amount of the purchase money, to which the defendants excepted. The defendant prayed an instruction that there was evidence of a warranty that the tobacco sold was merchantable, and that if it was not merchantable at the time of the sale, the plaintiff could not recover for that part which was not merchantable; also, that if the tobacco was, at the time of the sale, unsound and unmerchantable, and was not examined by the defendant, and if within a reasonable time he offered to return it, or such part of it as was unsound and unmerchantable, and the plaintiff refused to receive it, he was not entitled to recover for the part which was unsound at the time of the sale. The instruction was refused, and the defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed.

Walsh and Johnson, for the appellant, contended: 1. That the sale of the tobacco as of "Parkin's crooked brand," a favorite brand in the market, well known as a fine and merchantable commodity, was an express warranty that it was sound and merchantable; that the delivery of an inferior and unsound article, corresponding only in name, was not a compliance with the warranty: *Osgood v. Lewis*, 2 Har. & G. 495 [18 Am. Dec. 317]; *Bridge v. Wain*, 2 Serg. & Lowb. 487; *Tye v. Fynmore*, 3 Camp. 461; *Gardiner v. Gray*, 4 Id. 144. 2. That as the plaintiff knew that the defendants were merchants and bought the tobacco to sell again, there was an implied warranty that it would answer that purpose: *Gray v. Cox*, 10 Serg. & Lowb. 285; *Bluet v*

Osborne, 2 Id. 437; *Okell v. Smith*, Id. 316; *Gardiner v. Gray*, 4 Camp. 144; *Tye v. Fynmore*, 3 Id. 461; *Laing v. Fidgeon*, 6 Taunt. 108; and if the plaintiff claimed that the defendant should have examined the goods, he should show that he had an opportunity to do so: 8 Kent Com. 374. 3. That whether the warranty was express or implied, the breach of it was a defense to this action, and the defendant would not be put to a cross action: 2 Saund. Pl. and Ev. 917; 1 Selw. N. P. 149 (n.); *Farnsworth v. Garrard*, 1 Camp. 38; *Fisher v. Samuda*, Id. 190; *Payne v. Whale*, 7 East, 274; *Basten v. Butler*, Id. 479; 2 Stark. Ev. 641; *Miller v. Smith*, 1 Mason, 437; *Tuft v. Montague*, 14 Mass. 282 [7 Am. Dec. 215]; *Okell v. Smith*, 2 Serg. & Lowb. 316; *Lomi v. Tucker*, 19 Id. 255; *Johnston v. Cope*, 3 Har. & J. 89 [5 Am. Dec. 423]. 4. As to the evidence of an offer to return the goods, and the refusal, they cited *Yates v. Pym*, 6 Taunt. 447.

Gill, for the appellee, contended: 1. That there was no warranty, nothing being said as to the quality of the tobacco: *Osgood v. Lewis*, 2 Har. & G. 521, 523 [18 Am. Dec. 317]; *Johnston v. Cope*, 3 Har. & J. 89 [5 Am. Dec. 423]. 2. That if there was a warranty, as this was an action for the price, the plaintiff must nevertheless recover, unless there was not only a return, or offer of a return, of the goods in a reasonable time, but also knowledge of the unsoundness by the vendor, and that otherwise the remedy of the defendant was an action on the warranty: *Thornton v. Wynn*, 12 Wheat. 185, 193; and that the cases cited on this point on the other side were cases of actions on the warranty: 4 Johns. 421; *Bluett v. Osborne*, 2 Serg. & Lowb. 437; *Sands v. Taylor*, 5 Johns. 395, 410 [4 Am. Dec. 374].

By Court, DONNER, J. There is no pretense that the appellee was not a *bona fide* holder of the tobacco sold, without knowledge of its unsoundness, or that the kegs were not branded with the genuine mark of Parkin's crooked brand; but it is insisted that there was an implied warranty of quality, according to the principles settled by this court in *Osgood v. Lewis*, 2 Har. & Gill, 495 [18 Am. Dec. 317]. A fair exposition of the court's opinion in that case, will lead to no such inference. The general principle of the common law is there more than once reiterated, "that in sales of personal property the seller is not answerable for any defects in the quality or condition of the article sold, without an express warranty or fraud." In enumerating some of the exceptions to this rule,

it is stated, "that if the buyer had no opportunity of ascertaining by inspection the quality of the article, there is an implied warranty that it be salable in the market under the denomination by which it was sold." To sustain the appellant's position of implied warranty, no aid can be drawn from this exception. The purchase was of twenty-four kegs of tobacco, branded with Parkin's crooked brand, and by that denomination were they salable in the market. Of the quality of that tobacco, nothing was stipulated. The terms on the part of the vendor were complied with, by the delivery of tobacco, thus characterized by the brand. By the brand it was salable in the market, and that was the only assurance of quality on which the vendee relied. Once admit the doctrine contended for by appellant, and as to all commercial transactions, you, in effect, annihilate the distinction between warranty of title and warranty of quality. Every man who sells a barrel of flour, fish, pork, or any commodity subject to inspection, or which had acquired a reputation in the market, will be held impliedly to warrant both title and quality. To such a length this court feels itself wholly unauthorized to extend implied warranties. Nor could it do so without explicitly overruling the case of *Johnston v. Cope et al.*, 3 Har. & Johns. 89 [5 Am. Dec. 423], and unsettling the principles it has recognized in *Osgood v. Lewis*.

Much stress has been laid on an isolated paragraph extracted from *Osgood v. Lewis*, in which this court have said, that "it is not sufficient that the article delivered abstractedly bear the name of that contracted for; it must do more; there is an implied warranty that it be of that quality, which a commodity of that name must possess to be salable in the market." But construe this sentence in conjunction with the remaining parts of the court's opinion, and the interpretations attempted to be affixed to it can not for a moment be sustained. The remark was predicated upon the case of *Bridge v. Wain*, 1 Stark. 504, and immediately followed the reference made to it. In that case, Wain had sold to Bridge a quantity of "scarlet cuttings," an article in which the English dealt with the Chinese to a considerable extent. The proof was, that "scarlet cuttings" were understood in the market to mean cuttings of cloth only, without any admixture of serge or other materials; and that the article sold to the plaintiff did contain a quantity of serge, etc.

The position stated by this court was designed to be nothing more than what was considered as there decided; that although

the article delivered, abstractedly speaking, was scarlet cuttings, yet it was not scarlet cuttings of that quality which were salable in this market as such. So, in the present case, the delivery of any tobacco, not branded as per the bill of parcels, no matter what its excellence might be, would be no compliance with the terms of sale; it would not be sufficient, because it did not possess that quality, attribute, characteristic mark, viz., Parkin's crooked brand, by which it was known and rendered salable in the market.

It was urged, too, that from the nature of the article, and the manner in which purchases of it are made, the appellant had no opportunity of inspection, and that therefore the seller impliedly warranted its quality. But this exception to the general rule of *caveat emptor* does not apply to cases circumstanced like the present; but to those, where the examination at the time of sale is, morally speaking, impracticable, as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience or labor, is not equivalent to its impracticability. If the purchaser desire to avoid it, and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality.

It was likewise insisted that the appellee, knowing the purpose for which the tobacco was purchased, impliedly warranted it to be suitable therefor; that the opinions of Chief Justice Abbott and Lord Ellenborough, on which such a doctrine rests, were cited with approbation by this court in *Osgood v. Lewis*. But this is not the fact. No sanction or approval was then or is now designed to be given to those opinions. They were simply referred to as showing how much further some of the English judges appeared disposed to go in engrafting exceptions upon the rule, *caveat emptor*, than this court had gone in the case of *Osgood v. Lewis*.

The county court were right in instructing the jury, as in the first bill of exceptions, that there was no warranty of the quality of the tobacco sold. But they were clearly in error in the latter part of their instructions; that although the contract contained a warranty, and an offer to return the goods had been made by the vendee in due time, yet that it was no defense to the action unless the plaintiff knew of the unsoundness of the article. The *scienter* in such a case need not be alleged, and if charged, need not be proved.

This error of the court below, however, furnishes no ground

for reversing their judgment. The appellant sustained no injury from it, as he had offered no proof, either of a warranty or a fraudulent *scienter*. And upon no event, therefore, nor upon the assumption of both or either of these grounds, was it competent for the jury to have given a verdict in his favor.

The same remarks are applicable to the opinion of the county court, in the second bill of exceptions.

Judgment affirmed.

IMPLIED WARRANTIES ON SALES OF CHATTELS.—See, on this point, *Borrell v. Bevan*, 23 Am. Dec. 85, and other decisions in this series cited in the note thereto. In *Rice v. Forsyth*, 41 Md. 405, the principal case is recognized as an authority for the doctrine that, on a sale of a chattel, there is no implied warranty of quality, except under special circumstances.

DAVIS v. CALVERT.

[5 GILL & JOHNSON, 269.]

TO CONSTITUTE TESTAMENTARY CAPACITY IN THIS STATE, the statute requires that the testator be "of sound and disposing mind, and capable of executing a valid deed or contract."

CONDITION OF THE TESTATOR'S MIND, at the time of executing or acknowledging the will, determines his capacity.

EVIDENCE OF THE TESTATOR'S MENTAL AND PHYSICAL CONDITION, before and after executing the will, is admissible for the purpose of throwing light on his state of mind at the time of execution.

INCAPACITY MAY BE ESTABLISHED BY PROOF OF CONVERSATION, acts, or declarations of the testator inconsistent with sanity, or by all of them taken together.

THAT THE DISPOSITIONS OF A WILL ARE IMPRUDENT, and not to be accounted for, is not sufficient of itself to avoid it, but may furnish intrinsic evidence tending to show incapacity in the testator, and throwing suspicion upon the will, as where those having the strongest natural claims upon the testator's bounty are excluded without any apparent or known cause.

CONTENTS AND MANNER OF EXECUTION OF A WILL, the circumstances under which it was made, the testator's situation, the condition and relative situation of the legatees and devisees, and of the testator's connections, their claims upon him and the terms on which he stood with them, and the nature and extent of his estate, are all proper to go before the jury in determining the question of incapacity.

IMPORTUNITY AND UNDUE INFLUENCE are not inseparably connected with fraud, but may be fraudulently exerted.

NOT EVERY DEGREE OF IMPORTUNITY WILL INVALIDATE A WILL; honest and moderate intercession, persuasion, or flattery, unaccompanied by fraud or deceit, and where the testator is not threatened or put in fear, will not have that effect.

GREAT AND OVERRULING IMPORTUNITY AND UNDUE INFLUENCE, without fraud, may, under particular circumstances, avoid a will.

DEGREE OF IMPORTUNITY OR UNDUE INFLUENCE WHICH DESTROYS THE FREE AGENCY of a testator, and renders the will not his free, unconstrained act, is sufficient to invalidate it, not only as to the person using such influence, but as to all others intended to be benefited by it.

WILL MADE UNDER THE GENERAL CONTROLLING AND CONTINUING INFLUENCE OF FEAR or dominion over the testator, by one who has put him in fear, is invalid, though such influence is not immediately exercised with respect to the will; and proof of threats or violence at the time of making the will, is unnecessary.

WILL OBTAINED BY FRAUD is void; for fraud vitiates everything with which it is connected.

FRAUD IS NOT TO BE PRESUMED, but positive and direct proof of it is unnecessary.

WHERE FRAUD IS THE QUESTION, ANY FACT, HOWEVER SLIGHT, relevant to, and bearing upon the point at issue, is admissible; but the circumstances, when combined, should be so strong as to satisfy the jury of the fact sought to be proved.

REMOTE, COLLATERAL, AND IRRELEVANT FACTS and circumstances are inadmissible in evidence.

ANY FACT OR CIRCUMSTANCE PERTINENT AND MATERIAL to the issue, and tending to prove or disprove it, if offered to be proved by competent testimony, is admissible.

WHERE THE COURT DOES NOT CLEARLY SEE THAT A FACT IS ENTIRELY FOREIGN to the issue, and can not be connected with it by evidence of other facts, it is the practice to admit proof of it upon the assurance of the counsel offering it that it will turn out to be pertinent and material.

DECLARATIONS OF A SOLE EXECUTOR AND CONTINGENT DEVISEE, representing every interest under the will, and being a party on record, such declarations being adverse to the will, and bearing upon the issues raised upon a *caveat* against the probate of it, are admissible in evidence.

ADMISSION OF A PARTY ON RECORD IS ALWAYS ADMISSIBLE EVIDENCE, with certain exceptions, though he be but a trustee for another.

CONDITION, CHARACTER, AND CONDUCT OF PERSONS AROUND THE TESTATOR are important subjects of inquiry, in reference to his situation, family, and relations, the extent and nature of his estate, the dispositions of the will, and the devisees under it, in determining whether it was obtained by undue influence and fraud.

EVIDENCE OF ILLICIT RELATIONS between the testator and a woman to whom and her children the whole estate was given, and that she was a woman of dissolute character, and, while inducing the testator, an old and feeble man, to confide in her fidelity, was carrying on lewd intercourse with other men, is admissible, as tending to show undue influence.

EVIDENCE THAT THE MISTRESS' CHILDREN WERE NOT THE TESTATOR'S, in such a case, and that by reason of age and infirmity he was incapable of begetting children, where the will shows that he provided for them under the belief that they were his offspring, is admissible.

STATEMENT BY COUNSEL OF WHAT THEY EXPECT TO PROVE, in reply to a statement on the other side, is not a sufficient foundation for the introduction of adverse evidence otherwise inadmissible.

WHERE ANY PART OF A WILL WAS FIRST SUGGESTED BY ANOTHER, it must appear that its adoption by the testator was not due to mental incapacity, fraud, or undue influence.

IMPOSITION OR UNDUE INFLUENCE MUST HAVE OPERATED upon and controlled the testator at the time of executing the will, to invalidate it on that ground, of which the jury must judge, but no direct or immediate act of fraud or undue influence exerted at that time, need be shown.

FACTS NOT PUT IN ISSUE, BUT TENDING TO PROVE THE ISSUE, are admissible in evidence.

THAT SOME OF THE DEVISEES WERE SLAVES at the time of the making of the will, and therefore incapable of taking, where there is a contingent devise over to one of the caveatees, who is charged with undue influence in procuring the will, is a material subject of inquiry.

APPEAL from Montgomery county court, on exceptions taken at the trial, of certain issues directed to that court from the orphans' court, upon a *caveat* filed by the appellant as next of kin, against the probate of certain writings exhibited by George Calvert, Caroline Calvert, and others, appellees, as the last will of Thomas Cramphin, deceased, and two codicils thereto, the said George Calvert being named therein as executor and contingent devisee, and the other appellees being devisees and legatees under said will and codicils. The issues upon which the trial was had are sufficiently stated in the opinion. At the trial the plaintiff, now appellant, having proved certain facts which appear from the opinion, for the purpose of showing that the said Cramphin was not of sound and disposing mind, and that said will was procured by fraud, imposition, and undue influence, offered evidence to prove a certain declaration made by the defendant, George Calvert, which is also stated in the opinion, and also offered competent witnesses to show that Caroline Calvert, while living with the said Cramphin, as his mistress, and inducing him to confide in her fidelity to him, indulged in lewd intercourse with other persons; that before, and until becoming his mistress, she was a common prostitute; that the children of the said Caroline, named in the will, were by her deceitfully and artfully, and by undue influence, imposed upon the said Cramphin as his offspring, whereas they were in fact the spurious fruits of her secret amours and intercourse with other men; that by reason of old age, debility, and infirmity, the said Cramphin was, during his illicit connection with the said Caroline, physically incapable of begetting children; and that the defendant, George Calvert, was convinced, and believed, and had good reason to believe, that the said children were not Cramphin's offspring, and nevertheless aided and abetted the false and deceitful imposition of them upon said

Cramphin as his issue. Upon objection, by the defendants, the evidence offered on each of these points was rejected by the court, and to the decisions rejecting the same the plaintiff duly excepted. This constituted the first bill of exceptions.

It further appeared, that before any evidence was introduced, the plaintiff's counsel, in opening the case to the jury, stated the evidence proposed to be introduced to show fraud, imposition, and undue influence in procuring the will, the evidence so stated being the same in substance as that subsequently offered upon the trial. The defendants' counsel, in opening the case to the jury, before any evidence was offered, set forth in like manner the grounds and evidence upon which the defendants relied to support the will, and to repel the allegations and evidence of the plaintiff, stating, among other things, that it would appear that although the said Caroline lived with Cramphin as his mistress, she was otherwise of good character and conduct, and faithful to him as such mistress, a tender nurse of his old age, and careful superintendent of his household; that he acknowledged her children as his, and treated them as such, and that they were in fact his offspring, as was evidenced, among other things, by their strong personal resemblance to him. The counsel further read to the jury the plaintiff's libel, and George Calvert's answer to it. The plaintiff's counsel insisted that by this opening the defendants waived all objection to the admissibility of the evidence subsequently offered, as above stated, as to the true paternity of the said children, even though it would have been inadmissible without such opening; but the court held the evidence inadmissible, notwithstanding the opening made by the defendants' counsel. The plaintiff again excepted, and this constituted the second bill of exceptions.

The third bill of exceptions arose on the instructions of the court, given upon the prayer of the counsel for the defendants, with certain modifications prayed by the plaintiff's counsel. The substance of the first and second instructions is given in the opinion. The others were substantially as follows: 3. That before deciding that the instruments in question were obtained by fraud, the jury must be satisfied that fraud was actually proved, and that fraud was not to be presumed, but that fraud was not a single fact, but a conclusion to be drawn from all the facts and circumstances, and need not be proved by direct and positive proof, and that upon the issues in this case, the plaintiff was not bound directly to prove actual fraud; that the will and codicils might be as well impeached by showing that they

were procured by circumvention or by means of dominion and undue influence over the testator, but that circumvention and undue influence implied fraudulent practices. 4. That the question of the paternity of the children named in the will was not involved in any of the issues in the cause, and that evidence on that subject was not relevant to any of said issues, but that it was competent for the jury to presume, if it was proved to their satisfaction that the will was obtained by fraud, deceit, imposition, circumvention, or undue influence, that the acknowledgment of said children contained in the will was procured by the same unfair means as the rest of the will. 5. That the question whether any of the devisees or legatees in the will had legal capacity to take under the will, was not relevant to any of the issues in the cause. 6. That if the jury should believe that at the time of making the will and codicils the testator was of sound and disposing mind and memory, and was not then controlled in making the same by the fraudulent suggestions or undue influence of George or Caroline Calvert, or either of them, the verdict must be for the defendants on the first seven issues, but that it was the province of the jury to decide, from all the circumstances, whether such fraudulent suggestions and undue influence operated on the mind of the testator at the time of making the will and codicils, and induced him to make them as he did, though such fraudulent suggestions were not made at that precise time, and though no act was then committed in the palpable exertion of such undue influence. 7. That though the jury should believe from the evidence that the testator was induced to make said will and codicils by the persuasion, request, or importunity of the said Caroline, or any other person, this would not invalidate such will and codicils unless the jury should further believe, from the evidence, that such persuasion, request, or importunity was fraudulent, or was carried into effect by circumvention or by means of undue influence or dominion over the mind and actions of the testator, but that circumvention and undue influence implied fraudulent practices.

The court refused to modify the fifth instruction as prayed by the plaintiff, by adding thereto the following: That though the question whether the children named in the will were capable or incapable, as slaves, of taking under the will, or whether, in consequence of their incapacity, the devise over to the said Caroline or to the said George Calvert would take effect, could not be decided on the issues in this cause; yet the capacity of said

children to take, and the character and consequences of the devises over in case of their incapacity, were circumstances competent to be considered by the jury in deciding on the several issues touching the mental capacity of the testator and the fraud, deception, imposition, circumvention, and undue influence charged in said issues. The modification of the third and seventh instructions, by adding thereto the statement that circumvention and undue influence implied fraudulent practices, was made by the court at the instance of the defendants' counsel. The plaintiff excepted to all the instructions, and to the refusal of additional instructions as prayed by the plaintiff.

The defendants also took an exception, which, however, need not be stated, as it was not considered by the court. The verdict being for the defendants, the plaintiff appealed.

A. C. Magruder, Jones, and R. J. Bowie, for the appellant, cited authorities on the following points: 1. As to the admissibility of the evidence of the declarations of George Calvert, and of the other facts offered by the plaintiff to show fraud, deceit, imposition, and undue influence, and the incapacity of the alleged testator, and as to how far the plaintiff was required to go in the proof of such fraud, deceit, imposition, undue influence, and incapacity: 2 Stark. Ev. 390 and note (A); 1 Phil. Ev., secs. 6, 72, 74, 75, 112; Roscoe, 28; Peake Ev. 357, 375; *Goodright v. Saul*, 4 T. R. 356; *Bates v. Graves*, 2 Ves. jun. 288; *Harrison v. Rowan*, 2 Wash. C. C. 580; 1 Cox Ch. 354; *Marsh v. Tyrrel*, 4 Eccl. Rep. 51; 7 Bac. Abr. 303; 1 Madd. 256; Id. 283; *Green v. Skepworthy*, 1 Eccl. Rep. 34; *Clark v. Fisher*, 1 Paige, 171 [19 Am. Dec. 402]; *Patterson v. Patterson*, 6 Serg. & R. 55; *Dietrick v. Dietrick*, 5 Id. 207; *Harrison v. Vallance*, 1 Bing. 45; 4 Stark. 39-48; *Bauerman v. Radenius*, 7 T. R. 663; *Hanson v. Parker*, 1 Wils. 257; *Dowden v. Fowle*, 4 Camp. 38; *Bell v. Ansley*, 16 East 143; *King v. Inhabitants of Hardwick*, 11 Id. 578; *Curry v. Walker*, 1 Esp. 458; *Whitcomb v. Whitney*, Doug. 652; *Wood v. Braddick*, 1 Taunt. 104; Peake Cas. 203; *Nicholls v. Dowding*, 1 Stark. Cas. 81; *Lucas v. De La Cour*, 1 Mau. & Sel. 249; Bac. Abr., tit. Evidence, 673; *Davis v. Barney*, 2 Gill & J. 382; 2 Ev. Poth. 29; Swinb. 29; 3 Stark. Ev. 1704, 1705. 2. That the first instruction was erroneous: *Bennet v. Vade*, 2 Atk. 327. 3. That the third instruction was erroneous: *Harrison v. Rowan*, 2 Wash. C. C. 580; 2 Eccl. Rep. 131; 1 Swinb. 22 and note; 1 Fonb. 72, 73. 4. That the fifth instruction was erroneous without the modification prayed by the plaintiff: *Clark v. Fisher*, 1 Paige, 173; 2 South. 455; 6 Serg. & R. 55; 2 Stark. Ev. 1708.

5. As to error in the seventh instruction: 1 Swinb. 22. 6. They also cited 2 Atk. 324; 1 Fonb. 69, note (a); 7 Bac. Abr. 381; *Plume v. Beale*, 1 P. Wms. 388, to the point that this being a question of probate, and of the validity of the will, and not its jurisdiction, the probate court, and not the court of chancery, was the proper tribunal to decide it.

Swan, R. S. Cox, and Johnson, for the appellees, claimed among other things: 1. That the evidence offered as to the paternity of the children was inadmissible under the issues in this cause, though it might be admissible in a different class of cases: *Kenwell v. Abbott*, 4 Ves. 802; *Ex parte Wallop*, 4 Bro. Ch. 90; *Wilkinson v. Adams*, 1 Ves. & Bea. 422, 453, 462; *Gordon v. Gordon*, 1 Meriv. 141. 2. That evidence showing part of the will to be void was inadmissible under an issue going to the validity of the entire instrument: 8 Stark. Ev. 380; *Kenwell v. Abbott*, 4 Ves. 802; *Plume v. Beale*, 1 P. Wms. 388. 3. That the defendants' method of opening the case did not let in evidence otherwise inadmissible: *Stringer v. Young*, 3 Pet. 320, 337; *Walkup v. Pratt*, 5 Har. & J. 56. 4. That the instructions were correct: *Craycroft v. Craycroft*, 6 Har. & J. 57; *Coale v. Harrington*, 7 Id. 147; 3 Gill & J. 450; Hov. on Frauds, 17-27.

By Court, BUCHANAN, C. J. This case comes up on appeal from the Montgomery county court, on exceptions taken at the trial of issues sent to that court from the orphans' court of the same county, upon a *caveat* against the admission to probate of certain instruments of writing, purporting to be the will of Thomas Cramphin, and the several codicils thereto. There are three bills of exception, the two first to the rejection by the court of evidence offered on the part of the appellant to impeach those instruments, and the third to a series of instructions given by the court to the jury after the testimony was closed.

There is no question before us relating to the construction of the will. Nor is it a question before this court, whether the evidence offered, if true, would be sufficient to sustain the issues on the part of the appellant. That is not a subject for consideration on this appeal. All that we are called upon to do, and can legitimately do, is to decide upon the competency of that evidence, and the correctness of the instructions given to the jury, to do which it is necessary to see what the issues are. They are eight in number.

The first, whether Thomas Cramphin, at the several times of

signing the respective instruments of writing, was of a sound and disposing mind?

2. Whether, at the several times of signing them, he was urged thereto by such importunities of the appellees, or either of them, as he was too weak to resist, and under circumstances which left him not free to act in the disposition of his estate?

3. Whether his several signatures thereto were his own free and voluntary acts, with a knowledge of the contents of the several instruments, and without the exercise of an undue influence by the appellees, which, in his then situation and then imbecility of mind, prevented him from making a disposition of his property according to his own free will?

4. Whether the execution of the instruments was procured by fraud and misrepresentation of the appellees, or any of them, or by others acting with the privity, and by the directions of them, or any of them?

5. Whether, in the situation in which he was placed, and under the circumstances connected with the execution of the instruments, at the several times when they were executed by him, he was capable of knowing their contents, the manner in which they disposed of his estate, and of withholding his assent thereto?

6. Whether they are void by reason of undue influence, fraudulent devices, impositions, misrepresentations, and deceits, practiced upon him by Caroline Calvert, or by her procurement, to induce him to execute them?

7. Whether they are void by reason of undue influence, fraudulent devices, and misrepresentations practiced upon him by the appellees, or any of them, to induce him to execute them?

8. Whether at any time subsequent to their execution he was desirous of altering them, and whether he was prevented by the management, fraud, undue influence, or importunities of Caroline Calvert and George Calvert, or either of them, or others by their procurement?

The first relates to mental incapacity. The second to undue importunities by the appellees, or one of them. The third to undue influence by the appellees. The fifth to the capability of Cramphin to know the contents of the instruments, and to withhold his assent, under the circumstances connected with the execution of them. The fourth, sixth, seventh, and eighth relate to undue and fraudulent practices. They are substantially the same as respects the means supposed to have been

employed, but differ as to the persons employing them. The fourth looking to the appellees, or some of them, or to others acting with the privy and by the directions of them, or some of them. The sixth to Caroline Calvert, or some others by her procurement. The seventh to the appellees, or some of them; and the eighth to Caroline Calvert and George Calvert, or one of them, or others by their procurement.

The questions, then, that were presented to the jury for trial upon these issues, are questions of mental incapacity, undue importunity, undue influence, and of fraud.

The third section of the first subchapter of the act of 1798, c. 101, provides, "that no will, testament, or codicil, shall be good and effectual for any purpose whatsoever, unless the person making the same, be, at the time of executing or acknowledging it, of sound and disposing mind, and capable of executing a valid deed or contract." These latter words, "and capable of executing a valid deed or contract," are of importance in the investigation of every question touching the mental capacity of a testator. He who is not competent to execute a valid deed or contract, is, under the testamentary system of this state, incompetent to make a valid will or testament. It is not sufficient of itself, that a testator should be able to describe his feelings, or give correct answers to ordinary questions. His feelings at the moment may dictate his description of them, and the questions may prompt the answers, and yet he may be inadequate to the transaction of other business, and unable to dispose of his estate with understanding and discretion.

The written law of this state furnishes the rule by which the capacity of a testator is to be measured; and the inquiry must always be, whether, at the time of executing or acknowledging the will or testament, he was capable of executing a valid deed or contract; that is here the standard by which the mental capacity of a testator is to be ascertained, and no inferior grade of intellect will suffice. That state of mental capacity is to be determined by the condition of the testator's mind at the time of his executing or acknowledging the will or testament. For notwithstanding his incapacity at a prior or subsequent time should be proved, it does not necessarily follow that he was incompetent when the will or testament was made, as his incapacity before or after that time might have been the effect of a temporary cause. But for the purpose of shedding light upon the state of his mind, at the time the will or testament was made, evidence of its condition, and of his bodily imbecility,

both before and after that period, may be produced. And a jury may, upon the whole evidence, infer incompetency at the time of executing or acknowledging the will or testament, according to the character and cause of the entire incapacity proved; which may be established by proof of the conversations or actions or declarations of the testator, inconsistent with sanity, or of all of them taken together. The general maxim is, *semel furibundus semper furibundus præsumitur*. It is not of itself sufficient to avoid a will or testament, that its dispositions are imprudent, and not to be accounted for. But a will or testament may, by its provisions, furnish intrinsic evidence involving it in suspicion, and tending to show the incapacity of the testator to make a disposition of his estate with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty—such as a disposition of his whole estate, to the exclusion of near and dear relations, having the strongest natural claims upon his affection: a wife and children, for instance, or other near relations, without any apparent or known cause, which alone would be a suspicious circumstance, although not furnishing *per se* sufficient ground for setting aside the instrument.

This is but a single example, and not given as the only one, calculated to excite suspicion of the competency and freedom to act of a testator. The contents, therefore, of the will or testament itself, and the manner in which it was written and executed, together with the nature and extent of the estate of the testator; his family and connections; their condition and relative situation to him; the terms upon which he stood with them, and the claims of particular individuals; the condition and relative situation of the legatees or devisees named; the situation of the testator himself, and the circumstances under which the will or testament was made, are all proper to be shown to the jury, and often afford important evidence in the decision of the question of incapacity. And sometimes, if taken altogether, may, according to the degree of the injustice, absurdity, or unreasonableness of the dispositions attempted to be made of the property, tending to induce a reasonable doubt of the necessary sanity of the maker, and of his free agency uncontrolled by some undue influence, and the nature of the attending circumstances, and condition, and conduct, and character of those around him, justify a jury in deciding against the validity of the instrument, when its provisions, standing alone,

unattended by such circumstances, or not coupled with them, would not be sufficient.

Fraud is a distinct head of objection from importunity and undue influence. Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud; nor is it every degree of importunity that is sufficient to invalidate a will or testament. Honest and moderate intercession or persuasion, or flattery, unaccompanied by fraud or deceit, and where the testator has not been threatened or put in fear by the flatterer or persuader, or his power or dominion over him, will not have that effect. But there may be great and overruling importunity, and undue influence without fraud, which, when established, may and ought to have effect (under circumstances), to avoid a will or testament. Such as the immoderate, persevering, and begging importunities and flattery of a wife who will take no denial, pressed upon an old and feeble man, which may be better imagined than described; or dominion obtained over the testator under the influence of fear, produced by threats, violence, or ill-treatment. In neither of those instances may there be any direct fraud; but an overruling influence upon the mind and feelings of a testator, according to the degree of his judgment and firmness.

To persuade or importune merely, is not to defraud, neither is it a fraud to threaten or ill-treat, where there is no false impression, no deception practiced; but it is the moving cause of a pervading fear operating upon and governing the will and actions of the person so put in fear, and controlling and restraining the fair bias of his mind. Open violence is usually the opposite of fraudulent and deceitful practices; but not less destructive of the validity of a will or testament made under its influence. A testator should enjoy full liberty and freedom in the making of his will, and possess the power to withstand all contradiction and control: 1 Swinbourne on Wills, 22. That degree, therefore, of importunity or undue influence, which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it: *Kirloside v. Harrison*, 1 Eng. Eccles. Rep. 336; 3 Stark. Ev., pt. 4, 1707. Not in relation to the person alone, by whom it is so procured, but as to all others, who are so intended to be benefited by his undue influence.

That is the settled principle running through the books of

authority, and is equally applied to cases of fraud, as in *Bennet v. Vade and others*, 2 Atk. 324; *Ex parte Fearen*, 5 Ves. 633; *Ex parte Wallop*, 4 Bro. Ch. Cas. 90, and 4 Ves. 890; *Huguenin v. Bosley*, 14 Ves. 273; 7 Bac. Abr. 303, 304. If it were otherwise, the guards thrown by law around testators, and the interest of those having just and natural claims upon them, would afford but a very feeble protection; as he who procures a will by fraud, misrepresentation, imposition, or undue influence, may readily procure the property to be given to others, instead of reserving it directly to himself. No: but in the language of Lord Chief Justice Wilmot, in *Bridegroom v. Green*, "whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out among his relations and friends, will not purify the gift, and protect it against the equity of the persons imposed upon:" 14 Ves. 289. And so in 2 Bac. Abr. (Gwill. ed.) 303, 304: "If a man, by occasion of some present fear or violence, or threatening of future evils, does at the same time, or afterwards, by the same motive, make a will, it is void, not only as to him who puts him so in fear, but as to all others."

So that to avoid a will or testament it is not necessary that threats or violence should have been practiced or resorted to at the time of making it, but it is enough if it was made at any time afterwards, under the general controlling and continuing influence of fear or dominion over the testator by the person who so put him in fear; though not immediately exercised in regard to that particular instrument.

Fraud vitiates everything with which it is connected. A will or testament, therefore, which is obtained by fraud, is void, and though fraud is never to be presumed, yet it is not necessary to prove it by positive and direct testimony. But being usually wrapt up in mystery, if well concerted, it is generally by circumstances only, by inductions of particulars, some of them often apparently trivial, that it can be brought to light and defeated. And in a question of fraud, any fact, no matter how slight, bearing at all on the point at issue, and not wholly irrelevant, may be admitted. But the circumstances, when combined and considered by the jury, should be so strong as to satisfy them of the existence of the fact they are offered to establish.

It is a well-settled rule of evidence that remote and collateral facts and circumstances, not pertinent or relevant to the issue

to be tried, are inadmissible in evidence. They are not only useless, but as they are calculated to distract the attention of the jury, they may be mischievous, and tend to prejudice and mislead them. But it is equally well settled that facts and circumstances tending to prove the issue are admissible. Nothing that is pertinent or material to the issue joined, and tending to prove or disprove it, is inadmissible, if offered to be established by competent testimony, and it is the duty of the judge, in the exercise of a sound discretion, to discriminate between such facts as are merely collateral and foreign to the issue, and such as are connected with it.

It is sometimes difficult to ascertain whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation. In such cases the court, not clearly seeing that it is wholly foreign and irrelevant to the issue, and can not be connected with it by evidence of other facts and circumstances, it is proper and usual in practice to admit the proof on the assurance of the counsel who tenders it, that it will turn out to be pertinent and material; otherwise, material and important testimony might frequently and injuriously be excluded, which it is the province of the court to guard against when it may be done. As where the matter in issue depends upon a variety of facts and circumstances, to be proved in different ways, and by different witnesses, the whole of which can not always be presented to the court at one view, the relevancy of any one of which, standing alone as a mere isolated fact, may not clearly appear, and could only be shown by a disclosure of the whole in proof; and yet the rejection of it have the effect to destroy the force of all the rest, when the whole, taken together, would be conclusive of the question. And when it does not clearly appear *a priori*, that a fact offered to be proved is collateral and irrelevant, there is generally less mischief to be done or apprehended by admitting it, though it should afterwards turn out to be merely collateral, than by the rejection of the proof of a fact, only because standing alone, it does not plainly appear to be connected with the issue, but may, when connected with other facts and circumstances, become material and important. In short, no competent means of ascertaining the truth ought to be rejected; and all the surrounding facts of a transaction that can be established by competent evidence may be submitted to a jury, who are the judges of their force and effect. Applying these principles of law and rules of evidence to the present case, the tes-

timony offered at the trial on the part of the appellant, and rejected by the court, should have been suffered to go to the jury as evidence of facts relevant to, and tending to prove the issues on her part.

It is contended, on the part of the defendants, that the existence of the facts and circumstances offered to be proved, were not put in issue, and therefore properly rejected.

It is true that they were not put in issue, nor was it necessary that they should have been; but they were offered to establish the facts that were put in issue—mental incapacity, importunity, undue influence, and fraud; and if relevant to either of those issues, they were proper to be submitted to the jury, no matter how slight they may be supposed to be, whether taken separately or collectively. In the plea of *per fraudem*, has it ever been held necessary to set out every minute circumstance, by the aid of which the fraud alleged is proposed to be unveiled? The fraud imputed is one thing; the evidence by which it is to be established is another, and quite a different one.

The only questions here, then, are, first, whether the testimony by which the facts were proposed to be proved, was competent evidence for that purpose; and secondly, whether those facts, if established, are relevant and bear upon the points in issue, or any of them.

The first of these questions is settled by the record; the first bill of exceptions stating that they were offered to be proved by competent and credible witnesses.

As to the second, it appears that Caroline Calvert, who is the reputed illegitimate daughter of George Calvert by a female slave, was not the wife of Thomas Cramphin, but his kept mistress; that at the time of his forming that illicit connection with her, he was about seventy-five years of age; that, at that time, she was the slave of George Calvert, her reputed father, and continued in that condition until two days before the will was made, when she was emancipated by Calvert, Cramphin being then about eighty-five or eighty-six years old; that between the time when the connection was formed and the date of the will, she had the seven children named in the will, and one other, who was then dead, and afterwards and before his death, which was some time in December, 1830, three others, who are still living, and not provided for, though born free (being after their mother's emancipation), and capable of taking; that the deed of emancipation of Caroline Calvert, the mother,

contains a manumission of her seven children provided for in the will, to take effect *in futuro*, at certain specified periods, in relation to the males, on their attaining respectively the age of twenty-one years, and the females respectively the age of eighteen years; that at the same time a bill of sale was executed by George Calvert to Caroline, of the seven children, until they should respectively arrive, the males at the age of twenty-one, and the females at the age of eighteen years; that George Calvert is, by the will, made sole executor, and trustee in fee of all the property devised to the seven children, with a contingent devise in fee to Caroline, the mother, in the event of their being incapable of taking the benefit of the trust, from any cause whatsoever; and that two codicils were afterwards executed, in the last of which George Calvert is made contingent devisee of the whole estate. All of which having gone to the jury, the appellant offered to give in evidence the declarations of this same George Calvert (the reputed father of Caroline, and grandfather of the children, and who is described in the will as the confidential friend of the testator), made a few days after the testator's death; "that he had promised him (the testator), to provide for the children, yet that he did not consider himself bound to do so, because he was convinced that they were not his children," which were rejected.

Now, Calvert being executor and contingent devisee, and representing every interest under the will, and being also a defendant on record, evidence of any relevant declarations or admissions by him, adverse to the will, and bearing upon the issues or any of them, ought to have been admitted; the rule being "that the admission of a party on record is always evidence, though he be but a trustee for another," with certain exceptions not applicable to this case. It does not fall within the principle excluding hearsay evidence; and, with great deference, we think that his declarations offered to be proved are relevant, however trivial they may be considered standing alone. Seeing that he was the confidential friend of the deceased, who placed great reliance upon his judgment and fidelity, as manifested by the important trust confided to him, for it is a large estate, and the reputed grandfather of the children placed under his care, is it not clear that his promise, if made, had reference to the disposition of the will, and that they were conversing on that subject at the time the promise was given? And may it not be that this very old man, relying upon that promise, and the integrity and fidelity of his friend, was deceived into what he did

and would not have done but for that deception, if, indeed, it had relation to the children intended to be provided for, for it does not clearly appear to which set of the children of Caroline it did relate; but suppose it related to the three children born after the will was made, and not provided for, may it not be that the deceased wished and intended to make provision for them, but was prevented by the imposition and deception practiced upon him, if any such there was? and if so, if Calvert did make the imputed promise, intending to violate it, it was an imposition and deception practiced upon the old man. If the offer had been of evidence of an acknowledgment by Calvert, that he had forged the will, or extorted it by threats or violence, there would have been no difficulty about it. Here, indeed, the offer was of evidence of a circumstance only; but though a mere circumstance, it was of one tending to prove the issue of fraud, and which, when connected with others, might be found to be an important link in the chain.

As to the several other offers stated in the first bill of exceptions, we think they were all and each of them evidence pertinent and proper to have gone to the jury, as parts of the surrounding circumstances of the transaction, and tending to elucidate the matter in dispute, and ought to have been admitted.

In questions of this kind, the condition and character and conduct of the persons drawn around the testator are of importance to be inquired into, in reference to his family and relations, his own situation, the extent and nature of his estate, the character of the dispositions of the will, and to the persons to whom the property is given.

Here the condition of Caroline Calvert was that of a colored slave, the kept mistress of the testator, in which condition she continued until two days before the date of the will, with a view to which the deed of emancipation would seem to have been executed, when Thomas Cramphin was eighty-five or eighty-six years old; the estate is a large one, and the whole of it given to her and her children named in the will, with a contingent devise to George Calvert, to the exclusion of all others. Now, seeing all this, if it be true that Caroline Calvert was, before she had formed the illicit connection with Cramphin, and up to the time of that connection, a woman of lewd and dissolute habits, a common prostitute, which was offered to be proved; and if after that time continuing to live with him as his mistress to the day of his death, and inducing him to confide in her fidelity to him, she continued, unknown

to him, to indulge in secret intrigues, and lewd intercourse with other persons, which was also proposed to be proved, does it not throw a shade of suspicion over the will, and tend to shed light upon the subject in dispute? If she was a woman of such character and habits, and did so abuse his confidence, it was an imposition, a deception practiced upon that old man, calculated to induce a suspicion that the entire disposition of his large property to her and to her children was not the unbiased act of his mind. It may be a small circumstance, but in such a case there is no circumstance having any bearing upon the question that is too minute to be admitted.

It is apparent upon the face of the will that the deceased, Thomas Cramphin, supposed the seven children of Caroline Calvert, therein provided for, were his; and if in fact they were not his, but the spurious issue of her secret and lewd amours with other persons, and he was, by reason of old age, debility, and infirmity, physically incapable of begetting a child, and she did falsely, artfully, and deceitfully, and by her undue and overweening influence and dominion over his mind, impose them upon him as his children; and if George Calvert, believing them not to be his children, did aid and abet the false and deceitful imposition (all of which was tendered to be proved), it was an imposition and deception practiced upon him, closely connected with and strongly bearing upon the matter in controversy. Under the influence of that false impression alone, and by no independent motive of affection, he may have been induced to give his estate to Caroline Calvert and her seven children named in the will, which, but for such impression so made, he might not have done. In *Ex parte Wallop*, 4 Bro. Cas. 90, and 4 Ves. 809, where, upon application for a writ *de ventre inspiciendo*, it appeared that a woman, who had lived with a man named Fellowes, had made him believe that she had been brought to bed of several children which he was weak enough to suppose were his, and gave legacies to them, as her children by him, it was held that they were not entitled. And in *Clark and others v. Fisher and others*, 1 Paige, 171 [19 Am. Dec. 402], where the widow of the deceased procured from the almshouse a child, and imposed upon him as his niece the child of a deceased brother, to whom he gave a part of his estate, the will was set aside. As to the admissibility of proof relative to the question of paternity, *vide* 4 T. R. 350, and 6 Id. 330, and 2 Stark. Ev., part 4, 219.

The cases in 1 Ves. & Bea. 422, and in 1 Meriv. 141, cited

to show that evidence in relation to the paternity of these children could not be received, do not apply to this. In those cases no question arose concerning the due execution and the validity of the will, which had been established; but they were merely questions of construction and identity, and of the sufficiency of description of the persons claiming under the will.

As to the second bill of exception, the whole of the evidence that had been before rejected, was again offered, on the ground that all objection to it, if any existed, had been waived by the statements of the opening counsel on either side, which is again insisted upon here. We can not assent to the proposition that the statement by counsel of what they expect to prove in opposition to the statement on the other side, is sufficient to lay a foundation for letting in testimony otherwise inadmissible. But this being the same evidence that we have endeavored to show should before have been submitted to the jury, when offered again in an embodied and more imposing form, we think it ought not to have been rejected.

The instructions given by the court to the jury impaneled to try the issues which form the subject of the third exception, remain to be considered. They are seven in number, and were given on the prayers of the counsel for the defendants, most of them incorporating modifications prayed by the counsel on the part of the appellant. Of these are the first and second instructions, in both of which we concur.

The first, as so modified, being a direction to the jury, that if any part or clause of the will was first suggested by any other person, and adopted by the testator, it was necessary that such suggestion and adoption should not have been the result of his incapacity or weakness of mind, nor of fraud, circumvention, or undue influence, upon which it was for them to decide from all the facts and circumstances in evidence. And the second being substantially and practically a direction to the jury, that to invalidate the will, on the ground of fraud or undue influence, it was necessary that it should have been induced by fraud, circumvention, deception, imposition, or undue influence, operating upon and controlling the testator at the time it was executed; of which, and in what degree he was influenced and controlled, it was for them to judge from all the facts and circumstances in evidence; and that it was not necessary that such fraud or undue influence should have been immediately and directly exerted at the particular time at which the will was

made; and it is the only construction that can fairly be given to it.

The third and seventh instructions, incorporating the modifications proposed on the part of the counsel for the appellant, would have been proper if they had stopped there. But the addition by the court to each of them, that undue influence implied fraudulent practices, was wrong, seeing that there may be overweening and controlling undue influence without fraud, as has been before remarked and attempted to be shown.

The sixth instruction, including the addition prayed by the counsel for the appellant, does not, as has been supposed, look to the immediate and direct resort to and exertion of fraudulent suggestions and undue influence at the time the will was made, nor to the exercise of it in the procurement of that particular instrument, but to a general controlling, undue influence and dominion, operating upon the testator at that time, and inducing its execution, which so far is right and proper. But the same instruction limits the inquiry of the jury to the fraudulent suggestions or undue influence of George and Caroline Calvert, or one of them, and of the other devisees, or some of them, and is applied to the whole of the first seven issues; whereas there are some to which it can not relate. And if the will was the result of the fraudulent suggestions or undue influence of others, the effect would, under the fourth and sixth issues, be the same. It is therefore, as so limited and applied, wrong.

We can not concur in that part of the fourth instruction, in which evidence to prove or disprove the paternity of the seven children of Caroline Calvert, who are provided for in the will, is declared to be irrelevant to the issues, or any of them. The question, whether they were or not the children of Cramphir was not put in issue; but if they were not his children, it was, under the nature and circumstances of the case, a fact relevant to, and tending to prove a matter that was put in issue, as we have before endeavored to show.

In the fifth instruction to the jury, that whether any of the devisees named in the papers purporting to be the last will and testament, and codicils thereto, of Thomas Cramphir, have or have not a legal capacity to take under the said instruments, is wholly irrelevant to the issues, or any of them; the court, we think, erred, and should have given the fifth additional instruction prayed by the counsel on the part of the appellant.

It is true that the construction of these instruments, and whether the children named are capable of taking under them,

are questions not put in issue. But the question, whether they were improperly procured to be executed is in issue. Caroline Calvert is, by the original will, made contingent devisee of the whole estate; she has still living three other children, born afterwards, who, by codicil or other will, might have been provided for; yet no provision was made in their favor, though they were as much entitled to his bounty as the seven who are named; and no reason is shown why they were not afterwards provided for, but left penniless. If, after their birth, the will had been altered, and a part of the estate given to them, to that extent would her interest have been affected; for they were born free and capable of taking, being subsequent to her emancipation; whereas, in the event of the others being incompetent to take, the entire estate was by the will to go to her. She was interested, therefore, in both the will and their manumission being made as they were, and also in there being no subsequent alteration in favor of the three children born afterwards; which, looking to all the other surrounding circumstances of the transaction, is surely one having a bearing upon the question in controversy, and proper to be presented in argument to the jury, under the directions of the court. Besides, the same feeling that induced the testator to give such an estate to the children born and living at the date of the will, if it was his own free and unbiased act, would, as it would seem, if left to himself, have prompted him to make some provision for those who were born afterwards.

Judgment reversed, and *procedendo* awarded.

TESTAMENTARY CAPACITY, WHAT CONSTITUTES.—See *Clark v. Fisher*, 19 Am. Dec. 402, and note; *Tomkins v. Tomkins*, Id. 656; *Kinne v. Kinne*, 21 Id. 732, and note; *Higdon's Will*, 22 Id. 84. The foregoing decision is recognized as an authority on this point in *Higgins v. Carlton*, 28 Md. 144. So also the rule above laid down as to what constitutes "a sound and disposing mind," is approved in *McElwee v. Ferguson*, 43 Id. 484, 485.

IMPORTUNITY AND UNDUE INFLUENCE INVALIDATE A WILL, WHEN.—This subject is discussed in the note to *Small v. Small*, 16 Am. Dec. 257. See, also, *Clark v. Fisher*, 19 Id. 402, and note. The doctrine stated above, that the degree of importunity or undue influence which will avoid a will, is that which destroys the testator's free agency, and renders the will not his free, unconstrained act, is approved in *Wittman v. Goodhand*, 26 Md. 105; *Tyson v. Tyson*, 37 Id. 582.

DECLARATIONS OF EXECUTOR OR ADMINISTRATOR, ADMISSIBILITY OF.—In *Mangun v. Webster*, 7 Gill, 78, it was decided that declarations made by an administrator, after the death of the intestate, but before administration granted, were inadmissible as evidence against the intestate's estate, though the declarant was interested in the distribution, and it was said that this was not at war with the decision in *Davis v. Calvert*. Dorsey, C. J., delivering

the opinion, said: "The only question raised by the second bill of exceptions was, whether declarations of one of the administrators of the intestate, made after her decease, but before the granting of letters of administration on her estate, were evidence against the appellees in the trial of this cause. The inadmissibility of such testimony had been so recently adjudicated by this court in the case of *Dent's Administratrix v. Dent*, reported in 3 Gill, 482, that we felt disposed to regard the point as one no longer open for discussion. But it is insisted on behalf of the appellant that the decision in the case of *Dent v. Dent* is opposed to that made by this court in the case of *Davis v. Calvert*, 5 Gill & J. 269. * * * It is a mistake to suppose there is any contradiction or inconsistency in the opinions of this court in the cases of *Dent v. Dent*, and *Davis v. Calvert*. In the latter case, where such declarations were admitted, no letters testamentary or of administration had been granted, and the person against whom his declarations were received, appeared upon the record in the trial of the cause, in precisely the same character in which he had stood at the time the declarations were made by him. There is consequently no analogy between the two cases."

In the case of *Dent v. Dent*, referred to by Judge Dorsey, declarations of an administrator, made before administration granted, were excluded, because he had no interest in the subject-matter at the time they were made; and this was said to be one of the exceptions to the general rule, that admissions of a party to the record are always competent evidence.

One of the questions presented in *Mason v. Poulson*, 40 Md. 366, was as to the admissibility of certain declarations made by Poulson, caveatee and administrator *cum testamento annexo*, after he became such, to the effect that the testator had said to him that it was not his intention that the paper offered for probate, as his will, should operate as such. The court held these declarations inadmissible as hearsay. Upon this point in the case, Miller, J., delivering the opinion of the court, used the following language: "The ground upon which counsel for the caveators contend for the admissibility of this testimony is, that it proves admissions made by Poulson, a party to the record, and after he became administrator with the will annexed. There can be no doubt of the correctness of the position, that the acts and admissions of a party to the record are evidence, although he be but a trustee for another; provided, they be made and done after he is clothed with the office, or has acquired the interest. The law regards such admissions as declarations by the party against his interest, at the time they were made, and therefore probably true. This is a well-settled rule of evidence and finds constant application in *nisi prius* trials, but, like other similar rules, courts, in its application to particular cases, must consider the nature and character of the admissions proposed to be offered, their relevancy to the issue on trial, as well as the scope and purpose of the issue itself. So considered, our judgment is that the declarations sought to be introduced in this case are not of the character to which the rule applies. The question presented by these issues, and upon which the jury were to pass, is simply whether Mason's testamentary intent was finally expressed in the paper writing before them. His declarations on the subject were evidence whether he so intended or the contrary. Such declarations either way must be proved by those who heard him make them, and not by proving that some one who heard them, said he heard them, and it makes no difference whether such 'say so' came from the administrator or a party to the proceedings or not."

After remarking that the caveators might have called the administrator himself as a witness on that point, or might, by laying proper grounds, have impeached or contradicted him upon his testifying, with respect to such dec-

larations, on the other side, the learned judge proceeded: "In our opinion, the court below properly treated such testimony as secondary or hearsay evidence. We have carefully examined the ruling in *Davis v. Calvert*, 5 Gill & J., 306-308, chiefly relied on by the appellants' counsel, and, in our judgment, it is not, as they insist, a conclusive adjudication of the question before us. That case was a very peculiar and remarkable one. The issues presented not only the question of testamentary capacity, but whether the alleged will had been procured by undue influence, or by the fraud or misrepresentations of the caveatees, or either of them. The declaration of Calvert, the executor, and one of the caveatees, which the court there admitted, tended to prove the issue of fraud, and to show his participation therein. The court admitted it as a link in the chain of evidence on that subject. This, we take it, is the ground upon which that ruling is placed, and what the court said respecting the admissions of a party on the record being always admissible, and as not falling within the principle excluding hearsay testimony, is simply an enunciation of the general rule which they held applicable, on the ground above stated, to the admission they were then considering. This is plainly apparent from what is said by the court on page 308, viz.: 'If the offer had been of evidence of an acknowledgment by Calvert that he had forged the will or extorted it by threats or violence, there would have been no difficulty about it. Here, indeed, the offer was of evidence of a circumstance only, but though a mere circumstance, it was one tending to prove the issue of fraud, and which, when connected with others, might be found an important link in the chain.' The distinction between that case and the present is very obvious. Here the issues are not only different, but the proposed testimony is altogether of a different nature and character. The one falls strictly within the rule governing admissions as such, the other is purely secondary or hearsay evidence, and falls within the rule on that subject."

THAT EVIDENCE NOT CLEARLY IRRELEVANT WILL BE ADMITTED upon the assurance of counsel that it will become pertinent, is a principle for which *Davis v. Calvert* is cited as authority in *Buschman v. Morling*, 30 Md. 390. The case is referred to also in *Jameson v. Hall*, 37 Id. 233, on the point that great latitude is allowed in introducing evidence in cases of fraud, any fact, however slight, being admissible if relevant, but it must be made to appear to have some pertinency to the issue.

Judge Redfield includes *Davis v. Calvert* in his judicious selection of leading cases on wills: Redf. Am. Cas. on Wills, 420.

BIRELY'S EX'RS v. STALEY.

[5 GILL & JOHNSON, 432.]

RULES OF PLEADING IN EQUITY ARE NOT SO STRICT in matters of form as at law.

TWO CREDITORS MAY UNITE IN A BILL TO VACATE A CONVEYANCE by their debtor as fraudulent and void, under the statute of Elizabeth.

FUND REALIZED ON VACATING SUCH CONVEYANCE, at the suit of one or more creditors, is retained in court until all the creditors are notified to come in and assert their claims.

ALLEGATION THAT THE COMPLAINANTS PROCEED ON BEHALF OF THEMSELVES

AND OTHER CREDITORS in such a suit, is unnecessary where the prayer is that the property be sold for the benefit of the creditors.

WANT OF AN ALLEGATION THAT THE COMPLAINANTS WERE CREDITORS at the time of filing of their bill, is obviated by an answer substantially admitting that they were creditors.

CREDITOR MUST FIRST OBTAIN A JUDGMENT before resorting to equity to reach land fraudulently conveyed by his debtor, and in order to reach personalty so conveyed, must also have had execution issued; but this principle does not apply where the debtor dies after action brought, but before judgment at law, and the answer to the complainant's bill makes no such defense.

CREDITORS MUST BE PAID ACCORDING TO THE SENIORITY of their judgments, out of the fund pursued, if land, and according to the priority of delivery of their executions to the sheriff, where the property is personal, if their claims to relief rest upon their liens, which is not free from doubt.

CREDITOR OBTAINING JUDGMENT AFTER THE FRAUDULENT GRANTOR'S DEATH, against his personal representative, has no priority in equity in this state over simple contract creditors.

ALL CREDITORS WITHOUT JUDGMENTS, obtained in the grantor's life-time, come in *pari passu*.

JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR DOES NOT BIND REAL ASSETS, and is not even *prima facie* evidence of a debt, where the decedent's realty has been sold for the payment of all his debts.

JUDGMENT CAN NOT BE OBTAINED AGAINST HEIRS HAVING NO ASSETS by descent, for a debt of the ancestor.

OBJECTION RAISED FOR THE FIRST TIME IN THE APPELLATE COURT, after a trial on the merits, that a creditor seeking to vacate a fraudulent conveyance by his deceased debtor of his realty, that such creditor has not alleged or shown that he obtained a judgment in the debtor's life-time, will be reluctantly listened to, and the court will be astute to discover a method of frustrating it.

WHERE THE INFERENCE THAT THERE IS NO PERSONAL REPRESENTATIVE against whom judgment could have been obtained in such a case, and that there are no assets, is justified by all the circumstances, the objection raised first in the appellate court that the complainant has not shown a judgment, and that the personal representative has not been made a party, will be deemed obviated.

COMPLAINANT WOULD NOT BE REQUIRED TO TAKE OUT LETTERS of administration himself in such a case before bringing suit, since he could take no proceedings against himself.

ONUS ON GRANTEE TO SHOW THAT GRANTOR HAD OTHER ESTATE, WHEN.—

Where a grantee, in answer to a bill filed by his grantor's creditor, charging that the conveyance was fraudulent, and embraced all the debtor's estate, denies such allegation, and avers that the debtor had other estate in a particular county sufficient to pay the complainant, the burden is on him to prove that fact.

PRODUCTION OF CONVEYANCES WITHOUT PROVING THE EXISTENCE OF THE PROPERTY and the grantor's title or possession, or the grantor's possession thereof, is wholly insufficient to support such allegation.

ANSWER THAT THE GRANTOR HAD OTHER ESTATE IS NO BAR to a decree in favor of the complainant, in such a case, unless it is also alleged that

such estate was sufficient to pay not only the complainant, but all the creditors of the grantor.

SECRET ORAL CONTRACT BETWEEN THE GRANTOR AND GRANTEE in an absolute conveyance that it is to be in trust for all the grantor's creditors, will not support it if it is void under the statute of Elizabeth without such contract.

SUCH SECRET AGREEMENT CAN NOT BE ENFORCED by the grantor or his creditors at law or in equity.

EVIDENCE DRAWN OUT BY LEADING INTERROGATORIES will not be rejected where the same evidence is elicited by other interrogatories not objectionable on that ground.

APPEAL from the equity side of Frederick county court, in a suit brought to set aside as fraudulent, certain conveyances made by one Jacob Staley to the defendant, his son. The bill was filed in 1823, by Elizabeth Birely, since deceased, and one Holtz, setting forth, that on October 16, 1821, Jacob Staley was indebted to the complainants by notes, single bills, and bonds, for a large sum, for which suits were then pending, referring to exhibit No. 2; that on that day the said Staley made a conveyance of all his realty to the defendants for the purpose of hindering, delaying, and defrauding the complainants and his other creditors, and a few days afterwards likewise made a bill of sale to them of all his personalty for the same purpose, the defendants having knowledge at the time of the indebtedness to the complainants; that the said Staley died intestate and insolvent in March, 1822, being still indebted to the complainants. The bill prayed that the conveyances might be vacated and the property sold for the benefit of Staley's creditors, and for general relief. Exhibit No. 2, referred to in the bill, consisted of transcripts of docket entries, showing that Elizabeth Birely recovered judgment against Staley October 24, 1821, upon which a *fi. fa.* was issued and returned *nulla bona*.

The defendants in their answer admitted substantially that the amount of their father's indebtedness to the complainants was truly shown by the notes, bonds, etc., exhibited, and that suits were pending therefor on October 16, 1821, though they disclaimed all personal knowledge of those facts. They denied that the deed referred to conveyed all their father's realty, and averred that he was seised, after said deed was made, of real estate in Frederick and Montgomery counties amply sufficient to pay the complainants. They denied that the deed or bill of sale was fraudulent, or made to hinder, delay, or defraud creditors, but averred that both were executed *bona fide* and for valuable consideration. They averred that at that time they did not know

that their father was insolvent, though they admitted that he died insolvent. There was a general replication, and evidence was taken which it is unnecessary to state. At the hearing the bill was dismissed, with costs, and the complainants appealed.

Taney, United States attorney-general, Palmer, and Duckett, for the appellants, insisted: 1. That it was no objection that the bill was filed by two of many creditors; that the rules of pleading are not so stringent in equity as at law; and that this was properly a creditor's bill: *Tiernan v. Poor*, 1 Gill & J. 230 [19 Am. Dec. 225]; *Strike v. McDonald*, 2 Har. & G. 220, 232, 233. 2. That the fact that the complainants were creditors when the bill was filed, was sufficiently alleged. 3. That the exhibit referred to in the bill showed that the complainants were judgment creditors, but that it was not necessary in this case that it should appear that they were judgment creditors, referring to and commenting upon *Brinkerhoff v. Brown*, 4 Johns. Ch. 679; *Harwood v. Rawlings' Heirs*, 4 Har. & J. 126; *Gaither v. Welch*, 3 Gill & J. 262; *Coop. Eq. Pl.* 149; *Smithier v. Lewis*, 1 Vern. 398; 1 *Eq. Cas. Abr.* 132; *Copis v. Middleton*, 1 Madd. 556; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Hendricks v. Robinson*, Id. 296; *Sluby v. Jones*, 5 Har. & J. 381. 4. That it was not necessary that the personal representative of the grantor should be made a party, all the parties interested being before the court: *Dorsey v. Smithson*, 6 Har. & J. 61.

William Schley and F. A. Schley, for the appellees, claimed among other things: 1. That the other creditors of Staley should have been made parties, either in fact by joining them as plaintiffs or defendants, or by representation by filing the bill in behalf of all, citing *Leigh v. Thomas*, 2 Ves. sen. 312; *Hendricks v. Robinson*, 2 Johns. Ch. 296; *Coop. Eq. Pl.* 33; *Cromwell v. Owings*, 6 Har. & J. 10; *Darne v. Callett*, Id. 475; *Clark v. Long*, 4 Rand. 451. 2. That complainants should have shown by their bill that they were creditors when it was filed, citing *Coop. Eq. Pl.* 5, 6; *Mitf. Pl.* 294; *Beames' Pl. in Eq.* 8; 2 *Atk.* 632; 1 *Mont. on Pl.* 26. 3. That to entitle themselves to maintain this suit, the complainants should have shown by their bill that they had liens by virtue of having obtained judgments at law: *Coop. Eq. Pl.* 149; *Mitf.* 115; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Hendricks v. Robinson*, Id. 296; *Brinkerhoff v. Brown*, 4 Id. 677; *Screven v. Bostick*, 2 McC. Ch. 416 [16 Am. Dec. 664]; *Rhodes v. Cousins*, 6 Rand. 190 [18 Am. Dec. 715];

Gilpin v. Davis, 2 Bibb, 416 [5 Am. Dec. 622]; *Jones v. Sluby*, 5 Har. & J. 381; *Strike v. McDonald*, 2 Id. 191. 4. That this was not shown by the bill, citing as to the certainty in pleading required in chancery: 1 Vern. 483; Dick. 362; 2 Ves. jun. 318; 1 Id. 51, 287; 9 Id. 77; 5 Conn. 352, 592; 6 Id. 87; 7 Id. 342, 496. 5. That the exhibit was admissible only for the purpose for which it was referred to in the bill, that is, to show the pendency of the suits; the well-settled rule being that no evidence will be received as to matters not alleged: *Clarke v. Turton*, 11 Ves. 240; *Gordon v. Gordon*, 3 Swanst. 472; *Williams v. Llewellyn*, 2 Y. & J. 68; *Hall v. Malley*, 6 Price, 240; *James v. McKernon*, 6 Johns. 565; *Hoye v. Brewer*, 3 Gill & J. 153; *Chambers v. Chalmers*, 4 Id. 420 [23 Am. Dec. 572]; *Hayward v. Carroll*, 4 Har. & J. 518. 6. That the grantor's personal representative should have been made a party: *Dorsey v. Smithson*, 6 Id. 61; *Farley v. Farley*, 1 McC. Ch. 516; *Chamberlayne v. Temple*, 2 Rand. 397 [14 Am. Dec. 786]; *Screven v. Bostick*, 2 McC. Ch. 416 [16 Am. Dec. 664]; *Bradford v. Fedder*, Id. 169; 2 Hov. on Frauds, 75; *Wyse v. Smith*, 4 Gill & J. 295; *Fordham v. Rolf*, 1 Tam. 1; S. C., 2 Chit. Dig. 1491.

The counsel also made an extended argument, and referred to many authorities upon the question as to whether or not the evidence in this case showed that the conveyance and bill of sale were fraudulent.

By Court, DORSEY, J. Of the fraudulent character of the conveyances in question, on taking a full survey of all the facts and circumstances of this case, and drawing such inferences as a jury might reasonably make, we entertain no doubt. In deciding in favor of the appellants, the various questions of law presented by the able and ingenious argument on the part of the appellees, we can not but admit that some of our conclusions have been adopted not without difficulty and hesitation.

It was insisted in behalf of the appellees, that conceding the appellants' right to relief upon the ground of the invalidity of the deeds, under the statute of Elizabeth, yet that the decree of the county court denying such relief could not be reversed on account of various defects in the proceedings of the appellants by which it was sought; and first, that the bill of complaint was filed in the name of two creditors, whereas, all of them, or one only, should have been made a party complainant. This is a mere formal objection, not taken in the court below. If it had been, it might (if sustainable) have been removed by amending

the bill. The appellees admit that one creditor may sue alone. Then why may not two? Rules of pleading in equity are not governed by the same technicality, as to matters of form, that controls proceedings at law. Courts of equity look to substance, not form. The distinction, then (if it exist at all, which we can not admit), is a mere matter of form; nothing in reason or substance can be urged in its support. If one of many creditors proceed and be successful, the fund is retained in chancery until all the creditors are notified to come in and assert their claims. The same practice prevails on like proceeding by two.

Secondly, it is alleged that it is not stated in the bill, according to the usual form, that the complainants proceed on behalf of themselves and other creditors.

This objection we think fully answered, and the requisition, if it exist, substantially gratified by the prayer in the bill, that the property be sold for the benefit of the creditors of Jacob Staley.

The third defect suggested is, that the bill does not show or allege that the complainants were creditors at the time of filing their bill, but only at Jacob Staley's death. If it were conceded that this fault would have been fatal on demurrer, it can not avail the appellees, as the question now arises before the court. The strong, if not necessary implication of the existence of the complainants' claims, at the time of the filing of their bill, clearly arises from the facts therein set forth; but that implication is made irresistible by the answer of the appellees, who admit that the notes, single bills, and bonds exhibited show the "true amount of the debts due from Jacob Staley, deceased, to the complainants."

The fourth defect relied on is, that the complainants stand before the court as simple contract creditors only; whereas, to entitle themselves to the relief prayed for, they should have set forth in their bill, the judgments to bind the land, and *fi. fa.*'s to bind the personal property. In sustaining the appellants in the teeth of this objection, we do not mean to shake the general principle, that where a creditor seeks the aid of a court of equity to pursue property fraudulently conveyed away, a judgment must first be obtained against the debtor before his lands fraudulently granted can be reached; nor that in such a pursuit of personal property a *fieri facias* also must first have issued. In examining the authorities referred to by the appellees, to sustain their position, Chancellor Kent, in reference to personal

property, says, in *Hendricks v. Robinson*, 2 Johns. Ch. 296, "the preliminary step which seems to be required is, that the judgment creditor should have made an experiment at law, and bound the property by actually suing out execution;" and in *Brinkerhoff v. Brown*, 4 Johns. Ch. 677, "if he seeks aid as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in relation to personal estate, he must show an execution giving him a legal preference, or liens upon the chattels." And in *Shirly v. Watts*, 3 Atk. 200, a judgment creditor who had not taken out execution, having brought a bill to redeem against the mortgage of leasehold interest, Lord Hardwicke decreed that "the bill must be dismissed, because till execution, the plaintiff has no lien on the leasehold estate." If, then, the creditors' claims to relief rest upon their liens thus to be acquired (a position not entirely free from doubt), it follows as a necessary consequence, that out of the fund pursued, if land, they must be paid according to the seniority of their judgments; if personal property, according to their respective priorities, acquired by the delivery of their several *fi. fa's* to the sheriff. Would it for a moment contend that a court of equity in Maryland, in the distribution of funds brought within its jurisdiction, by a proceeding of such a character as the present, would sanction any priorities asserted in virtue of judgment rendered against his personal representative after the death of the fraudulent grantor? We think not. All creditors without judgments in the life-time of the fraudulent grantor, would come in *pari passu*. No subsequent judgment would create any lien. The frequent decisions of the courts of this state have long since settled, so as to preclude all debate on the subject, that a judgment against an executor or administrator not only does not bind real assets, but that it is not even *prima facie* evidence of a debt, where the real estate of a deceased debtor has been sold for the payment of all debts against him. Of what possible avail, then, would the required judgment against the executor or administrator of Jacob Staley be to charge the real estate in question? It has not been intimated that any judgment should be shown against the heirs of the deceased. Indeed, having no assets by descent, such a judgment could not be obtained against them.

But suppose we are wrong in this view of the subject; and that the inefficacy of the judgment as a lien does not of itself dispense with the necessity for its existence; still we are of opinion that the objection, as now presented to us, ought not

to be sustained. It is raised for the first time, as far as the record informs us, in the appellate court, after the parties have incurred great expense, and consumed much time in litigating their rights upon the merits of the controversy. Had it been relied on in the court below, either by demurrer, a plea in bar, or as a substantive ground of defense in the answer, it could have been easily obviated. As now presented, it works gross injustice, and is a complete surprise on the complainants. It becomes this court, therefore, to listen to it with a reluctant ear, and to be even astute in the discovery and combination of the facts in the cause, that the unjust operation of this unreasonable objection may be frustrated, and we feel ourselves warranted by the pleadings and circumstances of this case, in drawing such inferences of fact as enable us to surmount this difficulty. It is not a defense set up in the answer. It forms no part of the issues in the case. The complainants were not called on to account for the omission. If the deceased left no assets, the natural presumption is that no letters of administration would have been taken out on his estate; that had he left such assets, letters would have been granted, and the fair inference in that event is, that the appellees, in one of the three usual modes in which their object could have been effected, would have required that the administrator might be brought before the court, and be made to apply the effects in his hands to the satisfaction of the complainants' debt, thus extinguishing their right to prosecute any claim against the property conveyed. Not having done so, at this stage of the cause, the just conclusion is, that no administration was ever granted on the deceased's estate, because he left none; and this conclusion is rendered in the highest degree probable, if not irresistible, when we advert to the facts, which we assume as established by the record, that Jacob Staley, at an advanced age, to hinder and defraud his creditors, about five months before his decease, had conveyed away all his property, both real and personal, and from the time of such conveyance until the day of his death, lived as a dependent with one of the fraudulent grantees, and was admitted by all parties to have been insolvent at the time of his death. Weighing all these facts and circumstances in connection, and adverting to the time at which this question has been agitated, we deem ourselves justified in inferring that there exists no personal representative of the deceased against whom a judgment could have been recovered; or

to answer another objection raised by the appellees, who ought to have been before the court as a party to these proceedings.

But, say the appellees, even although it were proved that there were no assets, the complainants were bound to have taken out letters themselves, in order that proper parties might have been before the court, and the necessary preliminary judgments obtained. Would that have been accomplished by their administering? Could they sue and recover judgments at law, or file bills in a court of equity against themselves? Nay, would they not have been obliged to adopt the same course of proceeding, and established their claims in the very same way if they had administered, which they are now prosecuting without such administration? Where, then, the advantage or necessity of this unimportant, superfluous issue of letters of administration?

The foregoing views of this case render it unnecessary for us to consider the point so much controverted in the argument, whether the complainants' exhibit No. 2 is any further to be regarded as a part of the bill than to show the precedency of the suits, of which it was referred to as the proof.

The bill having charged that by the deeds complained of, Jacob Staley had conveyed to the appellees all his real and personal estate, and their answer having denied that fact, and averred that after the delivery of the deed to them he "was seised and possessed of real estate, both in Frederick and Montgomery counties, abundantly sufficient," as they believed, "to pay the claims of the complainants in this behalf," it was insisted that the defense is sufficiently established by the answer, and is a bar to the relief which has been sought by the bill. To this doctrine we can not accede. The fact of Jacob Staley's owning other real estate in Frederick and Montgomery counties, is a matter put in issue by the appellants; and being an affirmative allegation, the *onus probandi* rests upon the appellees. Aware of this, they have attempted to prove it, but by testimony inadequate to the object. The mere production of deeds of conveyance, unaccompanied by any proof of the existence of the property conveyed and the title of the grantor thereto, or his possession thereof, or the possession thereof by the grantee, is wholly insufficient for that purpose. In *Sands v. Hildreth*, 14 Johns. 499, Spencer, J., says: "It has been argued that Sands, the grantor, might have had property abundantly sufficient to satisfy his creditors, independently of the lands sold to the respondent. This, however, is not proved, and if it were true,

the appellant was bound to make out the fact. Not having done so, the inevitable conclusion is, that Sands had no other property out of which his creditors could obtain satisfaction."

But suppose the allegation as to real property be true, it forms no barrier to a decree in favor of the appellants. To be so, it should have alleged not merely a sufficiency of other estate to pay the claims of the complainants, but all the debts due by Jacob Staley.

It has been attempted to support the deed in question, on the ground, that being executed with a view to a sale for the payment of the debts of all the creditors, it stands untainted by fraud. If such were the object of the instrument, it should have formed a part of its contents, or been elsewhere reduced to writing. Being upon its face an absolute deed of bargain and sale, and being proved not to have been a *bona fide* conveyance, as such, it is covinous and fraudulent as against the complainants, and in violation of the statute of Elizabeth, nor can it be bolstered up by the fact of their having been a secret oral contract between the grantor and grantees, that the property conveyed should be held in trust, and sold for the benefit of the creditors of the grantor. The answer set up no such defense. Nor can it be supported on that ground, even if, in a proper state of the pleadings, it might be so relied on. The necessary tendency of such a transaction is covinous and fraudulent, so far as the pursuing creditors are concerned. A secret contract so made, could not be enforced, either at law or in equity, at the suit of the grantor or his creditors. The deed was executed according to the intention of the contracting parties; no mistake or surprise in obtaining it, nor was any fraud, duress, or imposition practiced upon the bargainor. The secret agreement is a nullity under the statute of frauds, and there is no head of equity jurisdiction, under which relief could be successfully sought, on such a contract. A court of chancery should therefore stamp on it the mark of reprobation.

The effort which was made for the rejection of the testimony of Joseph Miller, on the ground of its being given in answer to a leading interrogatory, is wholly without foundation, as all the material facts to which he deposed were elicited by interrogatories which stand free from all exception.

Decree reversed, and a decree was passed by this court for a sale of the property in the proceedings mentioned.

BUCHANAN, C. J., dissented.

RULES OF PLEADING IN EQUITY ARE MORE LIBERAL than at law: *Tiernan v. Poor*, 19 Am. Dec. 225. The principal case is recognized as an authority for this doctrine in *Ridgely v. Bond*, 18 Md. 450, and *Small v. Owings*, 1 Md. Ch. 367.

CREDITOR'S RIGHT TO RESORT TO EQUITY TO REACH ASSETS.—A creditor whose demand is purely legal, must have judgment at law before he can resort to equity to set aside a fraudulent conveyance: *Scott v. McMillen*, 13 Am. Dec. 239; *Sharp v. Wickliffe*, 14 Id. 37; *Allen v. Camp*, 15 Id. 109; *Gilpin v. Davis*, 5 Id. 622. To reach a debtor's personal assets in equity, the creditor must not only have obtained judgment at law, but must show that execution thereunder can not be enforced without the aid of equity: *Screven v. Bostick*, 16 Id. 664. But after judgment at law and the return of an execution unsatisfied, a creditor may, in order to reach equitable estate of the debtor, file a bill in his own name, or in behalf of himself and the other creditors, or join in a suit with the other creditors: *Edmeston v. Lyde*, 19 Id. 454; *Dugan v. Vattier*, ante, 105. As to creditors' bills to reach choses in action, see the note to *Donovan v. Finn*, 14 Id. 542. Judgment creditors may, in equity, come upon their debtors' equitable estate in realty, in the order of the dates of their judgments, the oldest having priority: *Haleys v. Williams*, 19 Id. 743. The creditor first filing his bill to reach property not subject to execution at law, is held to obtain a preference, in *Corning v. White*, 22 Id. 659. A judgment creditor's petition in equity against the representatives of a deceased debtor in Maryland, is held in *Coombs v. Jordan*, 22 Id. 236, to be equivalent to suing out a *scil. fa.* for the purpose of giving him the full benefit of his lien in obtaining a priority. As to the right of a creditor to resort to equity after obtaining judgment, for the purpose of affecting realty, and judgment and execution for the purpose of affecting personalty, the principal case is referred to as authority in *Griffith v. Frederick Co. Bank*, 6 Gill & J. 424, 444; *Swan v. Dent*, 2 Md. Ch. 117; *Wylie v. Basil*, 4 Id. 329. In *Wanamaker v. Bowes*, 36 Md. 56, the principle, that to enable a creditor to impeach a deed as fraudulent, he must first obtain a judgment or other lien, is approved.

Other points to which the case has been cited are: That a secret trust renders a deed fraudulent as to creditors: *Glenn v. Randall*, 2 Md. Ch. 229; that where a debtor transfers property to trustees for the payment of creditors in such manner as he sees fit, preferring some creditors, and reserving a balance to himself, without providing for all his creditors, the reasonable inference is that he does not intend to pay them out of that property; for if he did, he would provide for all in the same deed: *Langston v. Gauthier*, 3 Md. 51; as to what facts generally justify an inference of fraud in a conveyance: *McLaughlin v. Bank of Potomac*, 7 How. U. S. 229; as to the admissibility of declarations of a grantor to impeach his deed: *McDowell v. Goldsmith*, 6 Md. 340; that where the creditors of a deceased grantor assail a deed as fraudulent, and the grantee is entitled to the defense of the statute of limitations, he can not be deprived of that defense by any act or admission of the administrator of the grantor: *McDowell v. Goldsmith*, 24 Id. 230.

HUNTER v. BRYSON.

[5 GILL & JOHNSON, 483.]

TRUSTEES APPOINTED IN THIS COUNTRY BY A TESTATOR IN IRELAND with the same powers with respect to his property here as if they had been named executors, and with directions to collect and remit such property

to the executors appointed in Ireland, are limited executors, bound to execute their trust in the mode prescribed by the will.

WHERE ONLY ONE OF THE PERSONS SO APPOINTED ACCEPTS THE TRUST, he must execute it as provided by the will.

DIFFERENT EXECUTORS MAY BE APPOINTED IN DIFFERENT COUNTRIES, where the testator has effects, or as to different parts of his estate in the same country.

EXECUTOR IN THIS COUNTRY MAY BE COMPELLED TO REMIT FUNDS in his hands to the executor of the testator's domicile, according to the directions of the will, and it is wholly immaterial whether letters testamentary, or of administration *cum testamento annexo*, have been granted or not.

FOREIGN TESTATOR'S APPOINTMENT OF TRUSTEES HERE to act literally as such, without taking out letters testamentary or of administration, is a nullity as to his personal estate here, being an attempt to evade our testamentary system.

SUCH A TRUSTEE HAVING TAKEN OUT LETTERS OF ADMINISTRATION, is bound *ex officio* to the execution of every duty attempted to be imposed upon him as trustee, and can not discharge himself as administrator by a payment to himself as trustee.

APPEAL from Baltimore county orphans' court. A petition was filed in the court below by Thomas Hunter, appellant, against Nathan G. Bryson, the appellee, setting forth, in substance, that one Macartney, of Ireland, lately deceased, had, by his will, appointed the petitioner and another, now also deceased, his executors in Ireland; that his property consisting almost wholly of his interest in a certain firm in Baltimore, he also appointed the appellee, together with one Thompson and one Hughes, of Baltimore, trustees (as appeared by the will, a copy of which was exhibited with the petition) of all the testator's property in America, to do all his American affairs, to have full power to act for him, and to settle all his accounts in the way they shall think best, and, as soon as they conveniently can, to remit said property to his trustees nominated and appointed in Ireland; that Hughes and Thompson having refused to act, the appellee took out letters of administration, with the will annexed, and as such had received a large sum of money, which he had not accounted for, or paid over to the appellant as executor in Ireland, as directed by the will. The petition prayed a decree for an account and payment. The answer of Bryson denied the petitioner's right to demand an account or payment. It was agreed that the facts set out in the petition were substantially correct. It was also agreed that Bryson had passed two accounts, by the last of which there remained in his hands due the estate a balance of one thousand three hundred and fifty dollars and ninety-eight cents. It was further agreed

that the appellant was a resident of Vermont when the petition was filed, and that the petition should be considered amended by adding the name of James Hunter, as co-petitioner for the distribution of the estate, James Hunter being a legatee under the will. The decree below was that Bryson settle another account, crediting him for the balance due on the last account as paid over to himself as trustee under the will. The petitioners appealed.

Gill, for the appellant, contended, among other things, that the authority given to the three American trustees being a naked power, one alone could not act: 1 Liv. on Agency, 79; 2 Kent Com. 495; *Bergen v. Duff*, 4 Johns. Ch. 368; *Pallerson v. Leavitt*, 4 Conn. 52 [10 Am. Dec. 98]. As to how the distribution should be made, he cited *Dawes v. Head*, 3 Pick. 128; Id. 144; *Harvey v. Richards*, 1 Mason, 411-415; 2 Kent Com. 344-347; *De Sobry v. De Laistre*, 2 Har. & J. 224 [3 Am. Dec. 535].

Mayer, for the appellees, claimed that the question was principally one of jurisdiction, and that even if Bryson had been named executor, with all the powers given to the trustees super-added, he would have been only a trustee amenable to the court of chancery and not to the orphans' court, which had no jurisdiction to enforce such trusts: *Jeremy Eq.* 138; *Scurfield v. Howes*, 3 Bro. C. C. 91; *Southouse v. Bate*, 2 Ves. & Bea. 396; *Osgood v. Franklin*, 2 Johns. Ch. 21 [7 Am. Dec. 513]; *Davour v. Fanning*, Id. 252; that the trust devolved on Bryson where the others renounced it: *Osgood v. Franklin*, 2 Johns. Ch. 21 [7 Am. Dec. 513]; *Davour v. Fanning*, Id. 252; *Adams v. Taunton*, 5 Madd. 435; that if the renunciation defeated the trust, only the court of chancery could appoint another trustee to execute it, or the legatees might file bills for their legacies: *Ellison v. Ellison*, 6 Ves. 662; *Brown v. Higgs*, 8 Id. 570; that foreign executors could not recover these funds from a domestic administrator: *Dawes v. Head*, 3 Pick. 128; *Harvey v. Richards*, 1 Mason, 413, 423; *Kraft v. Wickey*, 4 Gill & J. 332 [23 Am. Dec. 569]; *Morell v. Dickey*, 1 Johns. Ch. 156; *Smith v. Union Bank of Georgetown*, 5 Pet. 518; *Guier v. O'Daniel*, 1 Binn. 349; 2 Mass. 384; that there is a difference between ancillary and principal administrators: *Bryan v. McGee*, 2 Wash. C. C. 337; that the petitioner having removed to this country, his authority had ceased, his remaining there being a condition annexed to the trust: *Co. Lit.* 27; 1 Cru. Dig. 79; 1 Rop. on Leg. 506, 521, 522.

By Court, DORSEY, J. In decreeing that Nathan G. Bryson had a right to pay over all the funds in his hands, as administrator with the will annexed, to himself as trustee, under the will of the deceased, and that he pass an account accordingly, we think the orphans' court were in error. As to all his property and affairs in America, the testator, in most explicit terms, gave to Hugh Thompson, Nathan G. Bryson, and Thomas Humes, the same powers and imposed on them the same duties as if by his will he had, in so many words, appointed them his executors. This provision of the will, *per se*, created them limited executors, and two of them having declined the appointment, and the third accepted it, he is bound to execute the trust in the mode prescribed by the instrument under which he derives his authority.

A testator may appoint different executors, in different countries, in which his effects may lie; or different executors as to different parts of his estate in the same country. Whether letters testamentary, or of administration *cum testamento annexo*, have been granted in this case, is a matter wholly immaterial, so far as respects the present controversy. The directions of the will must be complied with; and Nathan G. Bryson, in his representative character, should be decreed to transmit or pay the funds in his hands to the executor in Ireland, or show some satisfactory reason for his being excused from so doing.

But suppose Bryson not to be created executor by the clause in the will which has been referred to, and that the testator's design was that the persons appointed should act literally as trustees, without taking out any letters testamentary, or of administration. The appointment is a nullity, as far as the personal estate is concerned, being an attempt to evade the provisions of our testamentary system in a way which the law does not tolerate.

The administrator in relation to the personalty *ex officio* bound to the execution of every duty with which it was illegally attempted to clothe the trustees. And the effort to transfer the funds in the manner proposed by the decree from the hands of Nathan G. Bryson, as administrator, to those of Nathan G. Bryson, as trustee, is giving a construction to the act of the testator, to which no principle of judicial interpretation will lend even a momentary sanction.

The legatee, James Hunter, has assigned no sufficient reasons for his coming into the orphans' court, and demanding of Bryson the payment of his legacy. If any special circumstances

exist, warranting the interposition of a court of chancery in his behalf, he had better apply to that tribunal for relief.

The decree of the orphans' court is reversed, and the record remanded, that such proceedings may be had therein as the nature of the case may require.

Decree reversed.

FOREIGN ADMINISTRATORS, APPOINTMENT, POWERS, AND DUTIES OF.—See *Gless v. Smith*, 20 Am. Dec. 452, and other decisions in this series cited in the note thereto.

WERNWAG v. PAWLING.

[5 GILL & JOHNSON, 500.]

JUDGMENT OF A SISTER STATE properly authenticated stands upon the same footing as a domestic judgment, and if conclusive in that state, is equally conclusive here, and if re-examinable there, is re-examinable here.

JURISDICTION OF THE TRIBUNAL PRONOUNCING SUCH JUDGMENT, may be inquired into under proper pleadings.

AWARD OF ARBITRATORS UNDER THE PENNSYLVANIA STATUTE of 1810, after being returned to the office of the prothonotary of the court of common pleas, and after an entry of "judgment nisi" thereon, is as conclusive as any other judgment of that court, if the provisions of that statute, which confer jurisdiction upon the arbitrators, have been complied with.

IF THE RECORD SHOWS THAT THE PARTIES AGREED UPON THE ARBITRATORS, and that both parties were present when the time was fixed for the meeting of the arbitrators, the requirements of the statute as to residence of arbitrators, and notice, etc., need not be shown to have been obeyed.

VARIANCE IN AMOUNT BETWEEN SUCH JUDGMENT AND THE EXECUTION which appears to have been issued thereon, is no objection to the admissibility of the record of the judgment in an action on it in this state.

APPEAL from Frederick county court in an action of debt on a judgment of a county court of Pennsylvania, to which *nul tiel record* was pleaded. The record of the judgment, authenticated as required by act of congress, was admitted in evidence against the defendant's objection. It showed that under a rule of court for the selection of arbitrators, the parties, on the day appointed, agreed upon arbitrators, and on the time and place for their meeting; that an award, in favor of the plaintiff, for the amount now sued for, was reported to the prothonotary, and judgment nisi entered thereon December 24, 1824; and that a *ca. sa.* and *sci. fa.* had been issued thereon, which recited it to be for a larger amount. Judgment for the plaintiff, from which the defendant appealed on exceptions to the admission of the record as evidence, and to another ruling not necessary to be specified.

James Raymond, for the appellant, claimed, among other things: 1. That as this judgment was rendered by a court exercising special powers, a strict compliance with the law conferring the authority must be shown: *Shivers v. Wilson*, 5 Har. & J. 132 [9 Am. Dec. 497]. 2. That the construction of the Pennsylvania statute by her courts, if relied on, must be proved as a fact: *Brackett v. Norton*, 4 Conn. 517 [10 Am. Dec. 179]; *Andrews v. Herriott*, 4 Cow. 525, note 6. 3. As to the proper method of proceeding by the arbitrators in this case, he cited *Wickes v. Caulk*, 5 Har. & J. 38.

Duckett, for the appellee, contended: 1. That the plea of *nul tiel record* did not put in issue the validity of the judgment, and that no objection could be made to the judgment if the jurisdiction of the tribunal rendering it was not denied or disproved: 2 Saund. Pl. & Ev. 132, 315; 1 Id. 499; 1 Chit. Pl. 356, 481; *Hayward v. Ribbans*, 4 East, 311; *Cholmley v. Veal*, 6 Mod. 304; *Campbell v. Cumming*, 2 Burr. 1187. 2. That under the United States constitution and laws, this judgment had the same validity here as in Pennsylvania, and could only be attacked by the same plea, and that the plea of *nul tiel record* was not available here unless it would be there: U. S. Const., art. 4, sec. 1; Act of Cong. of May 24, 1790; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; 3 Story on Const. 181, 183; 1 Kent Com. 243; *Benton v. Burgo*, 10 Serg. & R. 240; *Nixon v. Young*, 2 Yeates, 156; *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]. 3. That this was a valid and binding judgment in Pennsylvania: *Commonwealth v. Lafitte*, 2 Serg. & R. 106; *King v. Sloan*, 1 Id. 78; *Post v. Sweet*, 8 Id. 391; *Zeigler v. Zeigler*, 2 Id. 286. 4. That an award of arbitrators under the Pennsylvania statute, after being duly entered, was a valid subsisting judgment, reversible only by appeal or writ of error, and not susceptible of collateral attack, even though erroneous: *Commonwealth v. Lafitte*, 2 Serg. & R. 106; *Ebersoll v. Krug*, 3 Binn. 528; *Studebaker v. Moore*, Id. 126; *Sicard v. Peterson*, 3 Serg. & R. 468; *Lents v. Stroh*, 6 Id. 38; *Zeigler v. Zeigler*, 2 Id. 286; *McPherson v. Hamilton*, 2 Yeates, 40; *Hostetter v. Kaufman*, 11 Serg. & R. 147. 5. That even if this award had been attacked at the proper time and in the proper way, the Pennsylvania courts would have sustained it: *Thompson v. White*, 4 Serg. & R. 135; *Spangler v. Rambler*, Id. 140; *Kimble v. Sanders*, 10 Id. 193; *Negley v. Stewart*, Id. 207; *Boone v. Reynolds*, 1 Id. 231; *Oppenheimer v. Comly*, 3 Id. 3; *Bosler v. Poe*, 13 Id. 232.

By Court, ARCHER, J. By the first section of the fourth article of the constitution of the United States, it is declared, "that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The object of this article of the constitution was to give to such judgment full faith and credit; that is, to attribute to them positive and absolute verity, so that they can not be contradicted, or the truth of them be denied, any more than in the state where they originated.

And congress, in conformity with the power conferred on the twenty-sixth of May, 1790, by their act passed on that day, declared that such records and judicial proceedings, authenticated as prescribed by the act, should have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. If a judgment is conclusive in the state where rendered, it is equally conclusive everywhere. If re-examinable there, it is likewise re-examinable here. It is therefore put upon the same footing as a domestic judgment: 3 Story on Const. 183; *Mills v. Duryee*, 7 Cranch, 481; 3 Wheat. 234. In *Mills v. Duryee* it is said, the only inquiry where the suit is upon the judgment of another state is, what is the effect of the judgment in the state where rendered? The question of jurisdiction of the tribunal pronouncing the judgment is, however, also examinable; for if the tribunal had no jurisdiction, the judgment would be a nullity everywhere: 4 Cow. 294; 15 Johns. 141.

The question, then, of the jurisdiction of the court pronouncing the judgment, would be open for inquiry on a proper state of pleadings. Without, however, stopping to inquire whether that question could properly be raised on the plea of *nul tiel record*, and on the bare offer to introduce the copy in evidence, we shall proceed to inquire whether there was a defect of jurisdiction, and if there was not, whether the proceedings are, with proper precision, specially set forth, without any examination of the legal necessity for so specially setting them out.

And here it may be remarked that a resort to the decisions of the courts of Pennsylvania, upon all the objections, both as to jurisdiction and the necessity of specially setting out all the

proceedings, to give validity to the judgment, would conclusively show that the various points raised by the appellant, in relation to these matters, could not be sustained in any tribunal of that state: 1 Serg. & R. 78; 2 Id. 106; 8 Id. 391; 3 Id. 468; 6 Id. 38; 4 Id. 140; 10 Id. 193, 207; 1 Id. 231; 3 Id. 3; 13 Id. 231, 232; 3 Binn. 126, 528.

But on the concession that these decisions, not having been proved as facts, could not be judicially noticed, and that they could legitimately have no other effect than the determination of any other learned tribunal which might be called on to aid us in the construction of the act of assembly of Pennsylvania (a question we do not mean to decide), we shall proceed to examine the act referred to.

The law was passed in 1810, and is entitled "an act concerning arbitrations." Its object and design was to enable either party to coerce an arbitrament of his case, without, and even against, the consent of the opposing party.

In ordinary cases, four things appear to be necessary to be done, before the jurisdiction attaches:

1. That there should be a rule of reference.
2. The appointment of arbitrators and notices as required by the law.
3. Residence of the arbitrators.
4. That they be sworn or affirmed.

The first and fourth requisites appear to have been complied with. The rule of reference was strictly in compliance with the act, and it appears by the return of the arbitrators, that they were sworn or affirmed; and as, by the act, they possessed power to qualify each other, their certificate is amply sufficient to establish that fact. The second and third requisites, although necessary to confer jurisdiction in ordinary cases occurring under the law, can not be required here.

It is averred in the record that the parties met in the prothonotary's office, and agreed upon the arbitrators to decide their cause; and, as appears from the record, being both present when the time and place of meeting was fixed by the officer, the notices demanded by the first and eighth sections were entirely unnecessary either to be proved or shown. Nor was it necessary it should appear that the arbitrators resided in the county where the reference was made, for it was competent, undoubtedly, for both parties to agree upon the arbitrators, without reference to their residence; and having so agreed, they ought not to be heard to say that they were not qualified to act for

want of residence, or because it did not appear where they resided.

It is manifestly unimportant at what period of time the award was returned; for the twenty-fifth section of the act making it their duty to return the award within a specified time, was not intended to affect the validity of the award, but only their compensation, which for their trouble they should receive, and operated in the nature of a penalty upon them for a failure to comply with the requisitions of the act.

From these considerations it appears that the jurisdiction of the arbitrators attached, and that everything has been set out in the proceedings, which it was necessary to show to give them validity.

The award being thus returned to the office of the prothonotary of the court of common pleas, it became a judgment of that court, entitled to all the consideration and conclusive character, which any other rendered in that tribunal could have, unless, indeed, as has been contended, it be considered from the entry of judgment *nisi* as a mere conditional judgment. But it ought not to be thus viewed. For the eleventh section points clearly to the meaning of the entry judgment *nisi*. It is to become an absolute judgment, unless an appeal be entered, and unless bail and recognizance be entered into within twenty days thereafter; for the law directs that unless such bail be given, execution may issue on such judgment. That this became a judgment of the court of common pleas after the entry of judgment by the prothonotary, has been decided in 3 Binn. 228, and in this decision we entirely concur. It is called a judgment in the law, and has all the attributes of a judgment imparted to it. It is a lien on the lands of the defendant, and its fruits may be reaped by an execution issued from the court of common pleas. And that tribunal would have all the power over such process, which it would have over any other process of execution, issued upon any other judgment by them rendered, which power could scarcely have been conferred had not the law-makers considered it a judgment, and a judgment of that court also. That the judgment may in many cases be entered by the prothonotary, while the court of common pleas was not in session, could scarcely be considered as bearing on this inquiry. The clerks of our own courts, by the law of 1801, c. 70, sec. 17, were permitted to enter judgments on the fiat of a judge, but they were not cer-

tainly on that account the less entitled to the appellation and dignity of judgments of the county courts.

Considering the judgment as one of the court of common pleas, no objection to the jurisdiction of that tribunal has been taken, unless, indeed, the objection which has been examined in relation to the arbitration. But it is supposed that there exists a variance between the record of the judgment and its statement in the pleadings. It would, indeed, appear from looking at the *ca. sa.* and the *sci. fa.*, which were issued on this judgment, that it had been for a greater sum than that stated in the *narr.* But we can not look to these to determine the extent of the judgment.

From the record of the judgment it would appear that it had been rendered for the sum stated in the award of the arbitrators, which corresponds with the sum averred.

The variance between the writ and the record offered in evidence as to the amount of the judgment, could not certainly on this issue be taken advantage of, and could furnish no objection to the admissibility of the record in evidence.

Judgment affirmed.

JUDGMENT OF SISTER STATE, EFFECT OF.—See the note to *Bartlet v. Knight*, 2 Am. Dec. 42. See, also, *Shumway v. Stillman*, 15 Id. 374; *Hall v. Williams*, 17 Id. 356; *Starbuck v. Murray*, 21 Id. 172; *Gulick v. Loder*, 23 Id. 711, and other cases cited in the notes to those decisions. In *McCormick v. Deaver*, 22 Md. 194, the principal case is recognized as authority for the position that a transcript of a judgment or decree of a sister state, certified as the act of congress provides, if no special objection is made thereto, imports absolute verity, and can not be contradicted in any other state any more than in the state where it originated.

RIDGELY v. IGLEHART.

[6 GILL & JOHNSON, 49.]

WHERE A DECEDENT'S LAND, NOT SUSCEPTIBLE OF PARTITION, IS SOLD, under the statute of 1820, to one of the heirs, who gives his bond to the state for the purchase money, such bond is a specific lien on the land enforceable in equity in favor of those entitled to share in the money.

AFTER A SALE OF THE LAND ON A JUDGMENT ON THE BOND by another heir, a third heir may sue in equity to enforce the lien for his share, instead of suing on the bond.

STATE IS NOT A NECESSARY PARTY to such a suit.

ALL THE HEIRS MUST BE MADE PARTIES to the suit, as well as the purchaser under the judgment.

APPEAL from the court of chancery, after a dismissal of the bill on special demurrer. The case is stated in the opinion.

Boyle, for the appellant.

Alexander, for the appellee.

By Court, BUCHANAN, C. J. Reuben Ridgely, one of the heirs at law of William Ridgely, deceased, having purchased from the commissioners appointed under the act of 1820, c. 191, relative to descents, the real estate of William Ridgely, which would not admit of division, and having given his bond to the state pursuant to the provisions of the act, conditioned for the payment to the other heirs of their respective proportions of the purchase money, the land was afterwards sold under a judgment at law, obtained against him upon his bond, for the payment of the portion of one of the heirs; and this bill was filed, by another of the heirs of William Ridgely, against the purchaser alone under the judgment, to subject the same land to sale for the payment of his proportion, and was dismissed by the chancellor.

On the part of the appellee it has been contended that there is no cause of action, no order appearing by the court, in which the proceedings were had for a division of the estate, designating the proportions of the amount for which the estate was sold, to which the heirs were respectively entitled. But that objection is rather too technical and attenuated.

It is not very clear that the words in the twenty-second section of the act of 1820, c. 191, "agreeably to the order of the court," were intended to relate to the proportions to which each of the heirs might be entitled, but may have been intended to be applied to the giving a bond to the state instead of one to each of the heirs, which, by the same section, is authorized to be done under the direction of the court.

But admitting it to be otherwise, such an order may have been made by the court, and would be proper evidence before the auditor, in stating an account between the parties; and if no such order was given, no injury could accrue to the party, since the proceedings under the petition for a division of the estate shows the amount for which the land was sold, and to be divided between the several heirs. And if the expenses allowed by the county court, attending the proceedings under the petition, were paid by the appellee, he would be allowed for them in an account taken by the auditor.

Chancery would never suffer the mere absence of such an order, as is supposed to be necessary, to work so serious a mischief as the destruction of the obligation of the bond, where no injury can arise to the party from the omission of it.

The supposition that the state should have been made a party, has no better foundation. The state has no manner of interest in the matter. A suit at law upon the bond would necessarily be in the name of the state for the use of the party prosecuting the action. But by the act of assembly under which the bond was given, it is declared to be a lien upon the land, and this is a proceeding not upon the bond, but a proceeding *in rem* to enforce the lien created by the act.

It is, however, contended, that the action should have been at law upon the bond, and that the remedy at law must be exhausted before recourse can be had to the land. But that is entirely a mistake; the purchase money for which the bond was given, is made by the act of assembly a specific lien on the land; as much so as if a mortgage had been given on the land for the money intended to be secured by the bond; and a party entitled to a proportion of that money has his election to prosecute, either his remedy at law upon the land, or to go into equity to enforce his lien on the land; as much so as in the ordinary case of a bond for the payment of money, accompanied by a mortgage of land as a collateral security.

And the circumstance, that in this case the land has passed into the hands of a sub-purchaser, makes no difference; he purchased it subject to the lien, and may have regulated his price accordingly. A court of chancery will not turn from its door a party coming to have enforced his lien so expressly created, merely to drive him to proceedings at law against a security; which may prove fruitless, and lead to vexatious and useless circuitry of action.

The solicitor for the appellee has invoked the aid of *Richardson v. Jones*, 3 Gill & J. 163, to sustain him on the ground upon which he has planted himself. But if he had examined that case with his accustomed accuracy, he would have found it to advance no such principle. The doctrine of that case is, that when a purchaser of a trustee's sale has completed his purchase, and complied with the terms of sale by giving his bond, as required by the order of sale, the payment of it can not be enforced in chancery in a summary way, by an order to bring the money into court, nor by a bill in chancery to enforce the specific performance of it, as a mere bond for the payment of money. But that the remedy on the bond, as such, is by a suit at law. But there is no intimation that, in such a case as the present, there may not be proceedings in chancery against the land to enforce the equitable lien, without first going into law on the bond.

The objection to the want of proper parties is better taken. It is a general rule in chancery, that all persons having an interest in the subject-matter of the suit, should be brought before the court, in order that a termination may be put to all controversy in relation to their different rights by one suit, if it can be done.

In this case all the heirs of William Ridgely, deceased, are interested, and should be made parties, to prevent deception and embarrassment to purchasers, by the extent of the liens being made known by the pleadings; and also to prevent a sacrifice piecemeal of the property, by sale after sale, under separate and distinct proceedings by the several heirs, with a great and ruinous accumulation of costs; and that there may be a decree upon the whole case, as far as it can be done, settling the rights of all who are interested.

The cause, therefore, will be remanded to the court of chancery.

TO ENABLE ANY OF THE PARTIES INTERESTED TO SUE ON A BOND given under the statute of 1820, referred to in the foregoing decision, it was held in *Thompson v. State*, 4 Gill, 163, that the court must first pass an order ascertaining the proportion to which such party was entitled, contrary to the intimation above thrown out. Dorsey, C. J., in that case said: "It is true that this court, in the case of *Ridgely v. Iglehart*, 6 Gill & J. 49, did intimate a doubt whether the words in the twenty-second section of the act of 1821, c. 191, 'agreeably to the order of the court,' were intended to relate to the proportions to which each of the heirs might be entitled. But after mature reflection, and a thorough consideration of the subject, we are satisfied that the words in the act of assembly and bond, 'agreeably to the order of the court,' do apply to an order of the court in relation to the proportions of the representatives of the intestate, and not to the mere order of the court, directing the bond to be given to the state. The court, however, in *Ridgely v. Iglehart* (which was a proceeding in chancery) conceived, no matter what construction, in this respect, should be given to the terms referred to in the bond and act of assembly, that a court of equity could, for the reasons assigned, grant the relief sought by the bill, and render full and adequate justice to the parties concerned. According to the strict and technical rules of the common law, we are of opinion that no recovery can be had in the action on the bond before us, without the preliminary order as to the proportions of the representatives of the intestate."

JOICE v. TAYLOR.

[6 GILL & JOHNSON, 54.]

MORTGAGE OBTAINED BY A FALSE REPRESENTATION by the mortgagee is void, even though he did not know the representation to be false, if the other party believed it to be true, and was thereby induced to make the mortgage.

GIST OF THE INQUIRY IS NOT THE KNOWLEDGE OF THE FALSITY of the representation of the party making it, but the other party's belief of it to be true as stated, and his consequent deception by it if false.

MATERIAL ALLEGATION IN A BILL, THOUGH NOT DENIED, must be proved.

APPEAL from the court of chancery, the cause having been removed to that court from the equity side of the Baltimore county court, where the bill was filed by Elisha Joice and Elizabeth, his wife, and Stephen Severson and Sarah, his wife, formerly Sarah Joice, to enjoin the sale of certain land upon a decree of foreclosure of a certain mortgage executed by the said Sarah before her marriage to Taylor, the defendant, and to annul said decree and declare the mortgage void, on the ground that the said land had been conveyed to the said Sarah by the said Elisha and Elizabeth Joice, in trust for the separate use of the said Elizabeth, the mother of the said Sarah, the said Elizabeth having inherited the said land from one Raven, and that the said Elizabeth was induced to consent to the execution of the mortgage by the said Sarah by certain false representations made by the defendant Taylor; and on the further ground that the decree of foreclosure was obtained without making the said Elizabeth a party to the suit. The bill was dismissed by the chancellor, and the complainants appealed. The material facts and other proceedings in the cause are sufficiently stated in the opinion of the court.

Learned and Johnson, for the appellants.

T. P. Scott, for the appellee.

By Court, MARTIN, J. The bill in this case was originally filed in Baltimore county court, on the twenty-ninth of September, 1830. Injunction was granted by that court, and the answer of the respondent and several exhibits filed by him, and a motion made to dissolve the injunction nisi, when the cause on the suggestion and affidavit of Elisha Joice, one of the complainants, was removed to the court of chancery. At December term, 1830, the injunction was dissolved by the chancellor, and at July term, 1831, a commission was issued to take testimony.

The bill states, among other things, that a mortgage had been executed by Sarah Joice, now Sarah Severson, to Elisha Taylor, for certain lands therein mentioned, and that upon the application of the mortgagee, a decree had been obtained in Baltimore county court to foreclose the mortgage, and sell the land to pay the sum it was intended to secure. That the mort-

gagor had no equitable right to make the mortgage; that the lands were held by her in trust for her mother; and that the mortgage was obtained from her by fraud and the misrepresentations of the mortgagee, in whom great confidence was placed, and by whom they were greatly deceived and misled, etc.

If the allegation in this bill, that the mortgage was obtained by the misrepresentation of the respondent, is established by proof, it would render the deed void; and it is immaterial as to its legal effect upon the instrument, whether the respondent, at the time he made the representation, knew it to be false. If he made a statement of facts, knowing it to be false, it would clearly be a legal fraud; but, although he did not know that it was false, yet if he undertook to state it to be true, without a knowledge of its truth or falsehood, and it operated as a deception to the other party to whom it was made, and thereby induced the mortgage, it would avoid it. The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the statement made as true was believed to be true, and therefore, if false, deceived the party to whom it was made.

In the examination of this case, the attention of the court is necessarily called to the answer of the respondent, and the caution adopted by him in answering, or rather avoiding to answer the allegation of his misrepresentations, is too obvious to be passed in silence. The allegation is, in substance, that Elizabeth, the mother, was entitled to all the real estate, and one third of the personal estate of Isaac Raven, deceased. That her husband, Elisha Joice, had purchased articles at the sale of Raven's estate, from Taylor, the executor. That Taylor, in order to obtain a mortgage on the lands of the wife, to secure the payment of the debt due from the husband, represented that the mortgage was only intended to enable him to settle up Raven's estate with the orphans' court, and that as soon as that settlement was made, he would pay over to Elizabeth Joice the portion due to her, by which the mortgage might be redeemed. The respondent answers fully all the minor allegations in the bill, and what does he say to the important charge of misrepresentation? He admits, "at the time of the execution and delivery of the mortgage, he did promise and assure the said Joice and wife, and Sarah Severson, that if, upon the final settlement of the personal estate of Isaac Raven, deceased, there would be anything due unto Elizabeth Joice, that then he would set off

the amount that might be so due against the said promissory note, and give up the said mortgage in case the said note was paid." There he stops. He does not deny that he stated to them the mortgage was necessary for him to settle with the orphans' court, and that upon that settlement, Elizabeth Joice's portion should be paid, with which she might redeem the mortgage; and yet that representation is the ground relied on by the complainants for relief. He therefore evades a direct answer to the allegation, and only states facts which may be true, although he may also have made the representation attributed to him. This allegation, however, although not particularly denied by the respondent, must be proved by the complainants to sustain their cause.

The court has carefully examined the testimony contained in this record, and without the aid of Sarah Severson's evidence (the objection to which was not considered, because there was sufficient evidence from other witnesses), is compelled to the conclusion that there has not been fair dealing on the part of Taylor in this transaction. The consideration of this mortgage appears from the statement or account delivered by Taylor to Israel as directory to him in preparing the mortgage. By that account it appears the principal item of the consideration was the sum of four hundred and twenty-three dollars and twenty-two and one quarter cents, due from Elisha Joice to Taylor for articles purchased at the vendue. That Taylor, at or about the time the mortgage was executed, represented to Mrs. Joice that she would be entitled to receive from the estate of Raven a larger sum than the consideration mentioned in the mortgage, is clearly proved, both by W. W. Waite and Francina A. Joice. Waite deposes to the further fact, that Taylor stated the mortgage was a mere matter of form, there being more money due from the estate of Raven than would pay it, but that it was necessary to have the mortgage to settle the estate with the orphans' court. Mrs. Joice had unlimited confidence in Taylor, and no doubt believed the statement thus made by him, and under that belief that the mortgage was a mere matter of form to enable Taylor to settle his account with the orphans' court, and would immediately be discharged by the money to be paid to her, she was induced to agree to its execution. It can not be credited from the facts disclosed in this record that Mrs. Joice would have consented that her land should be sold to pay the debt due from her husband to Taylor. Her husband was embarrassed, and she was desirous to protect this real prop-

erty from his creditors, and to reserve it for her own separate use.

The court is of opinion that this mortgage was obtained by the false representations of Taylor, and is fraudulent and void.

Decree reversed, with costs, the injunction made perpetual, and the mortgage declared to be null and void.

FALSE REPRESENTATION INNOCENTLY MADE entitles party injured thereby to remuneration, if he relies upon it as true, and suffers loss: *East v. Matheny*, 10 Am. Dec. 721. A misrepresentation of a material fact, whether fraudulently made or not, vitiates a contract induced thereby: *Shackelford v. Henry*, Id. 753. The positive assertion of that which is untrue, though believed by the assertor to be true, operating as the inducement to a contract, is fraudulent: *Snyder v. Findley*, 1 Id. 193. If an express representation is untrue, it has been held immaterial whether the party making it knew it to be false or not: *Waters v. Mattingly*, 4 Id. 63. This decision was, however, overruled in *Stewart v. Dougherty*, 3 Dana, 480.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

ADAMS v. CUDDY.

[13 PICKERING, 480.]

TRESPASS QUARE CLAUSUM FREGIT MAY BE MAINTAINED by a plaintiff who has any title to the *locus in quo*, that continued down to the time of the alleged trespass; and a husband seised in right of his wife has, during her life-time, a title sufficient to maintain such action.

EFFECT OF CONVEYING ALL THE RIGHT AND TITLE of a grantor is to convey all that has legally come to him, and that has not been legally parted with by him.

GRANTEE TAKING CONVEYANCE OF HIS GRANTOR'S RIGHT takes the risk of that right.

GRANTEE WHO LOSES HIS TITLE BY FAILURE TO REGISTER HIS DEED can not hold his grantor liable on the warranty therein, and therefore such grantor is not disqualified, by reason of interest, from testifying in a suit against such grantee.

DEED OF ADMINISTRATOR CONVEYS ONLY SUCH ESTATE as his intestate had.

NOTICE OF PRIOR UNREGISTERED DEED, EFFECT OF CONVEYANCES WITH.—

Where a grantee takes with notice of a prior unregistered deed and conveys to another, who takes with like notice, the latter, as well as the former, is precluded from setting up the subsequent deed against such prior unregistered deed.

TRESPASS *quare clausum fregit*. The defendant pleaded freehold in himself. Both parties claimed title from Sarah Baker, wife of William Baker. The *locus in quo* was part of a larger tract in South Boston, set off to her since the division of her father's estate. On December 21, 1807, William Baker executed a deed of the land in question to one Simonds, with covenants of seisin and warranty, purporting to convey in fee, and describing it by metes and bounds. Baker's wife joined in the deed in the following words: "In witness whereof, I, the said

William Baker, and my wife, in consideration of one dollar paid to me, by said Simonds, do forever quit my right and fee in said premises, and we have hereto set our hands and seals," etc. This deed was not recorded until June 3, 1808. On the seventeenth June, 1808, Simonds conveyed to the plaintiff, and the deed was recorded on the same day. On the twenty-fourth March, 1808, William Baker and wife executed a deed to his father, Allen Baker, in which William Baker released and forever quitclaimed all the right and title to the land he had in South Boston, formerly a part of the estate of his wife's father, deceased. This deed contained the following clause: "And I, Sarah Baker, for myself, for the above sum mentioned, do, for myself, forever release and forever quitclaim all my right and title to my honored father aforesaid, together with my right of dower, the receipt whereof we do hereby acknowledge, grant, bargain, sell, and convey unto our honored father aforesaid, to him, his heirs," etc. This deed was recorded on the twenty-eighth March, 1808. On the death of Allen Baker, his administratrix being authorized to sell his real estate, by deed, dated twentieth March, 1818, and recorded the next day, conveyed to Calvin Baker all the interest of the deceased in a certain tract of land in South Boston, described by metes and bounds. This tract included the *locus in quo*. Calvin Baker, in November, 1821, conveyed to the defendant the same tract.

The depositions of William and Sarah Baker, who were both living at the date of the alleged trespass, were introduced in evidence for the purpose of showing that when they conveyed to Allen Baker, he had notice of the prior deed to Simonds.

It was agreed, that if the plaintiff was entitled to recover, the defendant should be defaulted, and judgment rendered for the plaintiff for damages and costs; otherwise the plaintiff was to become nonsuit.

Simmons, for the plaintiff.

Rand and Fiske, for the defendant.

By Court, SHAW, C. J. The question between these parties is a question of title only, it being admitted that the defendant has done acts, which, if he can not justify on the ground of title, amount to a trespass.

The first question is, upon the effect of the deed of William Baker and wife to Simonds. It is certainly a very imperfect, illiterate, and ill-drawn conveyance. It is contended that there are no words of grant or conveyance on the part of the wife;

and this certainly seems to be the case, if according to the natural and grammatical construction of the language, the words are those of the husband only. But we do not consider that the court are called on to decide what *quantum* of estate passed by this deed. If any estate passed and that continued till the time of the alleged trespass, it is sufficient for this action.

The husband was seised in right of his wife. It does not appear by the facts, whether there were children of the marriage; if there were, the husband had an inchoate tenancy by the curtesy, which was an estate for his own life; but if they were not, he had a freehold, determinable upon the contingency of surviving his wife. In either way of considering it, he had a seisin; and such estate as he had passed by his deed to his grantee. It appears by the depositions in the case, that William Baker and his wife were both living, when the supposed trespass was committed, and therefore, that the plaintiff had a title at that time sufficient to enable him to maintain the action.

But another ground of defense, more confidently relied upon, is, that before the above deed was registered, the same estate was conveyed to Allen Baker, father of William, through whom the defendant claims, without notice of the prior conveyance, and the subsequent deed was first registered; and so that the defendant has the better title; and the dates of the execution and registry of the respective deeds would seem to maintain this ground.

To this the plaintiff makes two answers: 1. That the subsequent deed from William Baker and wife, to his father Allen Baker, did not include the land before conveyed to Simonds; and 2. That Allen Baker, the grantee, had notice of the prior conveyance to Simonds.

That the administratrix of Allen Baker supposed that the deed from William to his father embraced the premises, is manifest from the fact that she included that parcel in her deed to Calvin Baker, made in pursuance of a sale under a license; and Calvin Baker, in like manner, included it in his deed to the defendant. But if the estate did not vest in Allen Baker, then his administratrix had no authority to convey it, and her deed was void. And the court are all of opinion that the deed of William Baker and wife to his father, did not embrace the premises. This deed is quite as illiterate and informal as the one above remarked upon. It is, however, the deed of William Baker and his wife, and all the clauses of grant and release are the language of both, and bind the estate of both; and informal

as it is, it is to have its legal effect. The deed contains no covenants of any kind. The words, "grant, bargain, sell, and convey," are contained, but they come after the description, the words preceding it being "release and quitclaim." But without placing any reliance upon these informalities, we rest our opinion upon this; that examining the deed most critically, it does not purport to convey any land specifically, but only "all the right and title to the land I have in South Boston, formerly a part of the estate of James Blake, housewright, deceased;" and then afterwards the wife adds, "all my right and title to my honored father aforesaid;" probably the word "estate" of her father's was omitted by mistake. Now, we think, the effect of conveying all the right and title I have, by fair construction, means all that has come to me, and that I have not legally parted with. But the deed to Simonds, whether registered or not, gave a good title as against the grantor and his heirs. This, therefore, he had legally parted with, and it did not come within the general description of the estate conveyed. Were it construed otherwise, the grantors might, in effect, commit a fraud, without intending or even being conscious of it. Where a grantee takes by so indefinite a description as the right which the grantor has, he must take the risk of his grantor's right.

But upon the other ground, we are strongly inclined to the opinion, that the plaintiff has the better title. We do not perceive that William Baker and Sarah Baker were not competent witnesses. In the deed to his father, there is no covenant. In that to Simonds there are covenants of seisin and warranty. It is agreed that William Baker and his wife were then seised, and had a good and indefeasible title. Should Simonds or his grantee lose their title in consequence of not registering their deed, the warrantor would not be liable on his warranty for such defect. There seems to be no case in which Baker can be liable on his warranty, and if so, he is disinterested, and a competent witness.

The effect of his testimony is, that when he conveyed to his father, the latter had notice of his prior conveyance to Simonds. If such was the case, he could never set up his title, though his deed was first registered, against the prior unregistered deed to Simonds. And though if Calvin Baker and the defendant had taken a deed from Allen, without notice of such defect in his title, the title might be indefeasible in them, yet this principle would not apply here, as they did not take a deed of him, but of his administratrix, who could only sell such estate as he

had. But what is more important, before the defendant took his deed of Calvin Baker, or the latter took his of the administratrix, the deeds from William Baker to Simonds, and from the latter to the plaintiff, had been recorded; which was constructive notice to them. Now I take the rule to be, that if a grantee takes with notice of a prior unregistered deed, and he conveys to a second grantee, with like notice, the second, as well as the first, is precluded from setting up the subsequent deed against the prior unregistered deed.

Defendant defaulted.

UNRECORDED DEED IS GOOD AGAINST SECOND PURCHASER with notice: *Farnsworth v. Childs*, 3 Am. Dec. 249; *Trull v. Bigelow*, 8 Id. 144; *Priest v. Rice*, 11 Id. 156. The principal case was cited in *Flynt v. Arnold*, 2 Metc. 623, in *Lawrence v. Stratton*, 6 Cush. 167, and in *Jamaica Pond Corp. v. Chandler*, 9 Allen, 169, to the point that an unrecorded deed, as between the grantor and grantee, passes the title, and is valid as against subsequent purchasers with notice. In *Tuttle v. Jackson*, 21 Am. Dec. 306, it was decided that actual notice of an unregistered conveyance renders it impossible for a subsequent purchaser to protect himself against it. See also note to that case, p. 315. The principal case was cited in *Clark v. McElvey*, 11 Cal. 160, in *Coe v. Persons Unknown*, 43 Me. 436, and in *Hope v. Stone*, 10 Minn. 152, to the point that he who takes merely the right, title, and interest of a grantor, takes the risk of any infirmities or defects of title which may exist. In *Stanley v. Green*, 12 Cal. 167, to the point that a grant of the grantor's remaining interest necessarily excludes property previously sold by him. In *Bragg v. Paulk*, 42 Me. 517, to the point that a purchaser by quitclaim only takes what the vendor could lawfully convey. And in *Brown v. Manter*, 22 N. H. 471, to the point that a purchaser with knowledge of the existence of a prior unrecorded deed secures no rights against the holder of such deed.

NORTH BANK v. ABBOT.

[13 PICKERING, 465.]

HOLDER OF NOTE PAYABLE AT A PARTICULAR PLACE is not bound to present it for payment at any other place; and a refusal to pay on presentment at another place, is not a dishonor upon which the indorser can be charged.

NOTE PAYABLE AT EITHER OF THE BANKS OF A CITY in which there is a large number of banks, is a contract to pay at either of such banks that the holder may select.

SUCH NOTE BECOMES ONE PAYABLE AT A PARTICULAR PLACE from the time that the maker is notified at which of such banks it is, and his subsequent failure to pay it there is a dishonor upon which the indorser will become liable, on due notice being given to him.

PROOF THAT ESTABLISHES PLAINTIFF'S RIGHT TO RECOVER ON A NOTE will support the declaration in all cases where the note is given in evidence; and although such declaration alleges presentment and demand, they need not be proved if they were not necessary.

BOOKS OF ABSCONDED MESSENGER OF BANK, WHEN ADMISSIBLE IN EVIDENCE.—Where the messenger of a bank has absconded, and can not after due diligence be found within the jurisdiction of the court, a memorandum in a book kept by him showing that notice of dishonor of a note was given to the indorser, is admissible in evidence.

PAROL EVIDENCE OF CASHIER OF THE BANK IS ADMISSIBLE in such a case to explain such memorandum.

IT IS FOR THE JURY TO DETERMINE, on such evidence, whether notice was actually given or not.

ASSUMPSIT on a promissory note signed by Barnabee, payable to the defendant, or his order, at either of the banks in Boston, and by the defendant indorsed to the plaintiffs. The declaration contained a single count on the note, and averred presentment and demand of payment. At the trial, Steele, the cashier of the North Bank, testified that on the day the note became due, an agent of Barnabee called at the bank, and paid a part of the amount due on the note, which was indorsed thereon, and asked the witness to wait a day or two for the balance. He further testified that at the time the note became due, one Redman was the messenger of the bank, and it was his duty to enter in a book kept for that purpose all notes discounted by the bank, which were not paid on the day they became due, and to give notice of the non-payment of such notes to the indorsers, and to write in said book the names of the persons notified, and the places to which the notices were sent. The witness stated that he gave the note to Redman, and ordered him to send the notices; that the entries in the book were in Redman's handwriting; that Redman having been prosecuted for larceny, had left the commonwealth, and had not since returned. The plaintiffs also proved that they had used due diligence to obtain the testimony of Redman, but that he could not be found. They then offered in evidence the book which contained an entry of the note, with a mark against the name of the promisor and the indorser, indicating, as the cashier testified, that they had been notified.

The defendant objected to this evidence, and also to the parol evidence of the cashier, explaining the entries in the book, but his objections were overruled. The judge instructed the jury that, upon this note, it was not necessary for the plaintiffs to prove a demand of payment of the maker. To this instruction the defendant excepted. There was a verdict for the plaintiffs. And the questions of law above mentioned were reserved for the opinion of this court.

S. D. Parker, for the defendant, contended that there had

been no legal presentment and demand of payment in this case: *Sanger v. Stimpson*, 8 Mass. 260; *Sandford v. Dillaway*, 10 Id. 52 [6 Am. Dec. 99]; *Farnum v. Fowle*, 12 Id. 89 [7 Am. Dec. 35]; *Bailey on Bills* (Phil. & Sew. ed.), 125-130. And no notice of non-payment to the indorser: *Woodbridge v. Brigham*, 12 Mass. 403 [7 Am. Dec. 85]; *Beveridge v. Burgis*, 2 Camp. 262. He admitted that, where a note is payable at a place certain, no personal demand of the maker is necessary: *Berkshire Bank v. Jones*, 6 Mass. 524 [4 Am. Dec. 175]; *Woodbridge v. Brigham*, 12 Id. 405 [7 Am. Dec. 85]; S. C., 13 Id. 556; *Callaghan v. Aylett*, 2 Camp. 549; *Sanderson v. Bowes*, 14 East, 509; *Ambrose v. Hopwood*, 2 Taunt. 61; *Smith v. Bellamy*, 2 Stark. 224; *Hardy v. Woodroffe*, Id. 319. But he contended that in the case at bar the rule did not apply: 1. Because the plaintiffs alleged in their declaration that a demand was made; and that, being a material allegation, must be proved. Proof of matter of excuse would not support the declaration: *Rushlon v. Aspinall*, Doug 679; *Berkshire Bank v. Jones*, 6 Mass. 524 [4 Am. Dec. 175]. 2. Because the note in this case was not payable at a place certain. The entries of the messenger of a bank are not evidence in such cases, unless he is dead: *Cooper v. Marsden*, 1 Esp. 1; *Calve. v. Archbishop of Canterbury*, 2 Id. 646; *Sikes v. Marshall*, Id. 705; *Welsh v. Barrett*, 15 Mass. 386; *Outram v. Morewood*, 5 T. R. 121; *Peacock v. Monk*, 2 Ves. sen. 193, cites *Duchess of Marlborough v. Guidot*; *Framingham Man. Co. v. Barnard*, 2 Pick. 532; *Nichols v. Webb*, 8 Wheat. 385; *Union Bank v. Knapp*, 3 Pick. 96 [15 Am. Dec. 181]; *Harrison v. Blades*, 3 Camp. 457. Even though the book were competent evidence, the entry did not prove that any notice was given to the indorser, or that it was sent at all.

Sumner and Field, for the plaintiffs, contended that there had been a sufficient presentment and demand: *Rahm v. Philadelphia Bank*, 1 Rawle, 335; *Beeching v. Gower*, Holt N. P. 313; *Bank of U. S. v. Carneal*, 2 Pet. 543. The entries of the messenger were competent evidence: *Welsh v. Barrett*, 15 Mass. 380; *Whittemore v. Brooks*, 1 Greenl. 61, note.

By Court, SHAW, C. J. This is an action of *assumpsit*, by the plaintiffs as holders and indorsees of a promissory note, against the defendant as indorser. It was contended that, the note being made payable at a place certain, no presentment was necessary.

Where a note is made payable at a particular bank, or other place certain, it has long been held, and is now well settled, not

only that the holder is not bound to present it to the promisor, at any other place, but that a presentment at any other place would be unavailing; a promisor would be under no obligation to pay it at another place, and of course, a refusal to pay upon such presentment would be no dishonor, upon which the indorser could be charged: *Berkshire Bank v. Jones*, 6 Mass. 524 [4 Am. Dec. 175]; *Woodbridge v. Brigham*, 12 Id. 405 [7 Am. Dec. 85]; S. C., 13 Id. 556.

But it is impossible to say, that the note in question was made payable at a certain place. A note may, no doubt, be made payable at more than one place, an instance of which is to be found in a recent case; and in such case it would be sufficient to present the note at either of the places specifically named. It would be presumed in such case, that the maker kept cash at both such places. But where a note is made payable at either of the banks in a large city where there are about twenty, we think the natural construction of the contract is, that the note will be paid at either of the banks which the holder may select. It would seem to follow, from other established rules, that in such case, the holder should give notice to the promisor, where his note is. But of this it is not necessary to give any opinion in the present case, because it was proved, that in fact the promisor had notice that his note was in the North Bank, because, on the day it became due, he sent an agent, who paid a part of the money, and asked a few days delay for the balance.

When the holder had placed his note in a particular bank, either by a discount, so that such bank became the holder of the note, or for collection for account of another, the promisor became liable to pay at such bank in the same manner, as he would have been liable to pay at a particular bank named, had such place been expressed in the note. It follows, then, from the authority cited, that the holder is not bound to present the note at any other place, and if the maker fails to appear, or to provide funds to meet the payment, and if the note is actually at such bank, ready to be presented, and to be delivered up on payment, such failure of the promisor to appear, or to provide funds, is a dishonor, of which notice may be given to the indorser, upon which his liability will arise, if such notice be seasonable.

It was then contended that though no presentment and demand, under the circumstances, were necessary, yet the plaintiffs could not avail themselves of that fact in this action, because they had actually alleged and declared upon such presentment in this action, and that proof of matter of excuse will not sup-

port the declaration. Upon some consideration, however, we think this objection can not be sustained. It is probably the most usual practice to declare upon a note in the common form, averring a presentment and demand, even where proof of matter of excuse is relied upon. In all cases where a note is given in evidence upon the money counts, any proof which establishes the plaintiff's right to recover the note supports the count. This is certainly a convenient rule, and will seldom lead to any practical inconvenience; and this is well established by authority.

The principle of allowing some latitude in the mode of proof, where a presentment and demand are averred in the declaration, seems to be this: The plaintiff does not give in evidence matter strictly in excuse, but a qualified presentment and demand, or acts which, in their legal effect and by the custom of merchants, are deemed equivalent to a demand. There are various cases where, by force of law, by special agreement, or by usage, some particular mode of presentment is held valid, or some equivalent act taken in lieu of presentment and demand, as understood in its literal sense. As, where a note is made payable at a particular bank, if the maker is not at the place to receive the demand, and the holder has no right to present it at another place, leaving the note at the place, with authority to receive the contents, is held to be a demand. So, where it is the custom of banks, instead of presenting the note to the promisor, to send a notice to him to come to the bank and pay it, and this is known to the promisor, he shall be held to assent to it, and such notice is held to be equivalent to actual presentment: *Jones v. Fales*, 4 Mass. 245.

So, where it is agreed between the holder and promisor that notice may be left at a particular place, not his own place of business or residence, leaving the usual notice at such place is a sufficient presentment: *Whitwell v. Johnson*, 17 Mass. 449 [9 Am. Dec. 165]. In such cases, it has been held that an averment of presentment and demand generally, is satisfied by evidence of such special demand: *Hardy v. Woodroffe*, 2 Stark. 319; *Stewart v. Eden*, 2 Cai. 121 [2 Am. Dec. 222]. But in a case recently before this court, the point was raised and argued, and definitely settled: *City Bank v. Cutter*, 3 Pick. 414. In this case, the point was taken that the averment in the declaration was of a presentment to the maker for payment, but the evidence was of a notice issued from the bank, which was a fatal variance. But the court held it not a variance, being, in effect, a demand proved to have been made in a form which had been agreed

upon by the party to be affected by it, by a tacit reference to the custom and usage of the bank. The case before us is similar in principle.

It was further contended that due notice to the defendant, as indorser, was not given and proved, as required by law, to charge him. It was in evidence that the messenger of the bank, whose duty it was to give notices, had absconded before the trial; that diligent inquiries had been made with a view to obtain his testimony, which had proved wholly unavailing; whereupon evidence was offered of a minute book kept by him, with the testimony of the cashier, explaining the manner of keeping and the purposes for which the book was kept. This was objected to and admitted.

No case is precisely in point; but upon the authority of analogous cases, and the reason of the principle, we think this evidence was rightly admitted. In *Welch v. Barrell*, 15 Mass. 380, it was held that such a book, kept by the messenger of a bank, after his decease, is admissible to establish demands and notices. The ground is, that they are memoranda, made by an officer in the ordinary course of his business, and before any controversy or question has arisen. In *Nicholls v. Webb*, 8 Wheat. 326, it was decided that the minute book of a deceased notary might be received in evidence for the like purpose. In the case of the *Union Bank v. Knapp*, 3 Pick. 96 [15 Am. Dec. 181], it was decided by this court that the books of a bank, which had been kept by a clerk who had become insane, were admissible, upon proof of his handwriting, and that the books were kept by him in the regular course of his business.

The only distinction between these cases and the case at bar is, that here, for aught that appears, the witness is still living. But it was satisfactorily proved, not merely that the witness was out of the jurisdiction of the court, but that it had become impossible to procure his testimony. We can not distinguish this, in principle, from the case of death or alienation of mind. The ground is the impossibility of obtaining the testimony; and the cause of such impossibility seems immaterial.

It was alleged, but not strongly urged, that the book did not prove notice to the indorser. This was rightly left to the jury, with the explanation given by the cashier. The entry in the book was a short memorandum, stating the amount of the note, the day it fell due, and the names of the promisor and indorser, with a mark against them, which, it was testified by the cashier, indicated that they had been notified. This was competent evi-

dence. Such a memorandum is not like a contract or other written instrument; it is more like a writing in cipher or a foreign language, which may need an interpreter. With the testimony of the cashier, as to the meaning and effect of the entry, it was competent evidence, from which the jury might infer the fact of notice.

An objection was taken to the instruction stated in the report, that no demand of payment of the maker was necessary upon this note. This, of course, must have been given in reference to the circumstances of the case on trial, and must mean that no other demand was necessary than that of having the note at the bank ready to be delivered up on payment, of which the maker had previously had notice; and so understood, we think no valid exception to this instruction can be taken.

Judgment on the verdict.

In the case of *Malden Bank v. Baldwin*, 13 Gray, 154, it was decided that a presentment for payment at any bank in Boston, of a note payable "at bank in Boston," or "at either bank in Boston," was a sufficient demand upon the maker to charge the indorser. In delivering the opinion of the court in that case, Bigelow, J., said: "We think it very clear that the stipulation in the note declared on, making it payable 'at bank in Boston,' which is the same in effect as if it had been payable at any bank in Boston, was not intended for the benefit of the maker. His liability was fixed and absolute, whether the note was presented for payment or not: *Carter v. Smith*, 9 Cush. 321. The object of the stipulation therefore was to accommodate the payee or holder, by giving him the right to elect the place at which the note should be presented in order to charge the other parties liable thereon. * * * The maker's promise is to pay at any one of the places designated, at which the holder may elect to present his note, and the duty is imposed on him to look at all these places for it, or provide funds to pay it at all of them when it is due. If he fails to do so, the note is dishonored. * * * We are aware that in *North Bank v. Abbott* and *Carter v. Smith*, above cited, a different doctrine was intimated; but the observations of the court on this point were only *obiter dicta*. As applied to contracts generally, other than negotiable notes, drafts, and bills of exchange, they may be perfectly sound. But these last constitute an exception to any such rule, on account of the necessity which exists for securing their free and unrestrained circulation; and we are satisfied that it would tend to clog the facility of their negotiation, and violate the well-settled practice of the mercantile community, to require that the holder should give to the maker notice of the place where he intended to present his note for payment at its maturity."

NOTE PAYABLE AT PARTICULAR PLACE.—It was decided in *Weed v. Van Houten*, 17 Am. Dec. 468, that, in an action on a promissory note payable at a particular place, it was not necessary to aver or prove presentment at that place. See also *Eastman v. Fifield*, 14 Id. 371, and note 373; *Conn. v. Gans*, 13 Id. 639; *Woodbridge v. Brigham*, 7 Id. 85; *Berkshire Bank v. Jones*, 4 Id. 175, and note 176. But see *Mellon v. Croghan*, 15 Am. Dec. 163, where a different doctrine was held. Also *Smith v. McLean*, 7 Id. 693, and *Sullivan v. Mitchell*, 6 Id. 546.

The principal case is cited in *Harrison v. Bailey*, 93 Masa. 621, to the point that in an action by the indorsee against the indorser of a promissory note, evidence of a waiver of demand and notice is sufficient to support an averment in the declaration of demand and notice. And in *Shone v. Wiley*, 18 Pick. 562, to the point that a book kept by a clerk of a bank, who has absconded, is good evidence; and in *Porter v. Julson*, 1 Gray, 176, to the point that memoranda made by notaries are, after their decease, from necessity, good secondary evidence, because it is in the usual course of their duty and business to keep such memoranda.

WARREN v. MANUFACTURERS' INS. CO.

[13 PICKERING, 518.]

POLICY OF INSURANCE ON CARGO OF VESSEL IS NOT AVOIDED by the non-compliance of her owners with a statute of the United States requiring all vessels bound on a voyage across the Atlantic to have on board, secured under deck, a certain quantity of water, and imposing a penalty on the master or owner in case the crew or passengers are put on short allowance through failure to comply with its requirements.

SUCH NON-COMPLIANCE DOES NOT OF ITSELF render the voyage illegal, or the vessel unseaworthy.

ASSUMPSIT on a policy of insurance on profits of a cargo on a voyage from the island of Cuba to Boston. It appeared from the master's testimony that he sailed with his water on deck, and having none secured under deck. The defendants contended that the vessel was, for this reason, *ipso facto*, unseaworthy under the statutes of the United States, referred to in the opinion. They also contended that, independent of these statutes, in point of fact, a vessel, bound on such a voyage, in the winter time, without a quantity of water secured under deck, was unseaworthy. Upon this point, competent evidence on both sides of the question was given to the jury. For the purpose of presenting the question of fact to the jury, the judge ruled that, in point of law, a vessel which sails on a foreign voyage without any water under deck is not necessarily unseaworthy, the question being reserved for the consideration of the whole court. The jury returned a verdict for the plaintiff.

Sohier, for the defendants, contended that the policy was not binding, because the statute, which was imperative, had not been complied with: 1 Pet. Adm. 213, note; Abbott (4 Am. ed.), 434, note 2; *Harden v. Gordon*, 2 Mass. 559. It was not competent for the jury to find that one of the requirements of the statute was unnecessary: *Coleman v. Brig Harriet*, Bee, 80; *Law v. Hollingsworth*, 7 T. R. 160; *Farmer v. Legg*, Id. 186.

Contracts of this kind impose on the assured the duty of navigating the ship according to law, and it was a sufficient defense to the action that they had not complied with their contract: *Woolf v. Claggett*, 3 Esp. 257.

Fletcher and Bartlett, for the plaintiffs, contended that the non-compliance of the master with the requirements of the statute did not, in this case, render the voyage illegal, nor the ship unseaworthy: *Hughes on Ins.* 273; *Atkinson v. Abbott*, 11 East, 135; *Law v. Hollingsworth*, 7 T. R. 160; 1 Phillips on Ins. 119, 124.

By Court, WILDE, J. By the United States statute of 1790, c. 56 [29], sec. 9, it is enacted that every ship or vessel, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, etc., for every person on board such ship, etc., and in like proportion for shorter or longer voyages, and in case the crew of any ship or vessel, which shall not have been so provided, shall be put on short allowance in water, etc., the master or owner of such ship or vessel shall pay to each of the crew one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance.

The defendant's counsel contend that the non-compliance with this requisition of the statute rendered the voyage illegal, and consequently that the policy is void. They rely on the general principle that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void as being against the policy of the law. This general principle is well established, but like all general rules, it is not without exceptions; and the present case, we think, falls within one of the exceptions to the general rule. The rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy; but where a contract is founded on a transaction which is prohibited for the benefit of a particular individual or individuals, and has no influence on the public welfare, such contract is not absolutely void, but only voidable by the party for whose benefit the prohibition is introduced. So, where an act is enjoined under a penalty, and a contract is remotely and incidentally connected with the omission to do and perform the act enjoined, the contract is not necessarily void: *Atkinson v.*

Abbott, 11 East, 135; *Johnson v. Hudson*, Id. 180; *Hughes*, 273; *Law v. Hollingsworth*, 7 T. B. 160; *Dawson v. Atty*, 7 East, 367; *Bell v. Carstairs*, 14 Id. 374; *Carruthers v. Gray*, 15 Id. 85; *Ward v. Wood*, 13 Mass. 539; *Mitchell v. Smith*, 4 Yeates, 86; *Gremare v. Valon*, 2 Camp. 144.

The case of *Atkinson v. Abbott*, 11 East, 135, was a case on a policy of insurance, and it was contended for the defendant, that the policy was void because a false clearance had been taken out contrary to the 13 Car. II., c. 11. But it was decided that this did not avoid the policy. Lord Ellenborough remarks, that "there is nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy, to which there is no intention of going." The statute of Car. II., only gives a penalty of one hundred pounds for taking out a false clearance, but there is nothing in that to make the voyage illegal.

In *Ward v. Wood*, 13 Mass. 539, the insurance was upon an armed ship, with liberty to cruise and capture the vessels and goods of the enemy. One of the grounds of defense was, that the master, in pursuance of instructions from the owners, had broken open vessels captured, and taken out part of their cargoes before condemnation; but the court held, that although such a practice was censurable, and against the directions of a statute of the United States, the policy was not thereby rendered void; that the statute was merely directory, obedience to the law being enforced by bonds and penalties, and that disobedience did not make the voyage illegal.

Upon the authority of those cases, and upon principle, we think it very clear, in the present case, that the voyage was not illegal by reason of the non-compliance with the statute, nor the vessel unseaworthy on this account. The statute was made for the benefit of the crew; and was afterwards extended to passengers by stat. 1819, c. 170. Both statutes are merely directory, and amount to no more than this, that the master and owner shall be liable to a penalty, if the crew or passengers shall be put on short allowance, provided the vessel shall not have been supplied with water, etc., in compliance with the directions of the statutes.

The question, whether, independently of the statutes, the vessel was not, in point of fact, sufficiently equipped and provided with water for the voyage, has been decided by the jury on the evidence, and no objection is made to the correctness of their decision in this respect.

Judgment according to the verdict.

Cited in *Boardman v. Merrimack Ins. Co.*, 8 Cush. 586, as holding that a non-compliance with a positive law of the United States in the conduct of a voyage, did not avoid the policy; and in *Deshon v. Merchants' Ins. Co.*, 11 Metc. 209, as having settled the question that non-compliance with a statute of the United States, imposing a penalty for not carrying water under deck, did not, as between the parties, constitute a case of unseaworthiness.

SCANLAN v. WRIGHT.

[13 PICKERING, 523.]

REGISTRY COPY OF DEED IS GOOD EVIDENCE PRIMA FACIE, and dispenses with production of the original, except where a grantee relies on the immediate deed to himself, or where, from the nature of the conveyance, the deed is presumed to be in his own custody or power.

UNITED STATES CONSUL HAS POWER TO TAKE ACKNOWLEDGMENT OF DEEDS in a foreign country, and a deed so acknowledged before him is entitled to registry in this state.

CONVEYANCE OF ALIEN WHO WAS ONCE WELL SEISED of an indefeasible estate, vests such estate in his grantee, subject only to be defeated by the government.

ALIEN HUSBAND TO WHOSE WIFE LAND IS CONVEYED becomes jointly seised with her in her right; but his estate is defeasible, and subject to escheat at the suit of the government.

OBJECTION THAT ONE OF THE PARTIES TO A PARTITION SUIT IS AN ALIEN, is in abatement only, and comes too late after issue is joined.

PAROL EVIDENCE, WHEN ADMISSIBLE TO EXPLAIN DEED.—Where a grant was made to a married woman in her maiden name, parol evidence is admissible to show that the grantee was the person to whom the grant was made; that she was at the time of the grant known to the grantor by her maiden name; that there was no other person claiming to bear the name used in the deed, or claiming title under it.

ESTATE CONVEYED TO MARRIED WOMAN UNDER AGE VESTS IN HER, subject only to be divested in case she shall disagree to it when discoverd, and of full age.

PETITION for partition. The petitioners, who were husband and wife, alleged seisin in her right of an undivided moiety of the premises described in the petition. The respondent traversed their seisin, and on this plea issue was joined. At the trial, the petitioners introduced in evidence a deed of the whole of the premises from one Andrews to John Cheverus, and also a subsequent deed of one half of the premises from Cheverus to the respondent. They then offered a registry copy of a deed of Cheverus, which described him as "formerly resident in the city of Boston, in the United States of America, but now of Bordeaux, in the kingdom of France, Roman Catholic Archbishop," to Benedict Fenwick of Boston, Roman

Catholic Bishop. This deed, which was acknowledged at Bordeaux, before D. Strobel, American consul at that place, and recorded in the registry of deeds of Suffolk county, purported to convey all the estate of which the grantor was possessed in the United States, and particularly in Boston, without describing any estate in particular. To the admission of this deed in evidence the following exceptions were taken: 1. That the original deed should have been produced. 2. That the deed was not acknowledged before a magistrate. 3. That Cheverus, who was a naturalized alien, having removed to France, and accepted office there, before the date of the deed, must be deemed to have renounced his allegiance to the United States, and ceased to be a citizen thereof, and could not therefore convey real estate in this state by deed. These objections were overruled.

The petitioners then gave in evidence a deed from Fenwick to Eliza Ann Castin, conveying to her an undivided moiety of the premises. Nearly a year prior to the date of this deed, the grantee had been married in New York to Thomas Scanlan, but this fact was unknown to Fenwick when he executed the deed. Scanlan was proved to be a native of Ireland, and there was no evidence that he had been naturalized. His wife was a minor at the commencement of this suit, and they were the petitioners therein. To the admission of the evidence last mentioned, the following exceptions were taken: 1. That by the deed to Eliza Ann Castin, after her marriage, no estate passed either to her or to her and her husband jointly. 2. That the husband being an alien, and the wife a minor, they did not become seised. 3. That he being an alien, and she a minor at the time of the commencement of this suit, they were not competent to prosecute it. These objections were overruled *pro forma*, and the questions thereon were reserved for the opinion of the court. Verdict for the petitioners.

S. D. Parker, for the respondent, contended that the deed from Cheverus to Fenwick being a recent deed, and the grantee within the jurisdiction of the court, a registry copy was not competent evidence: *Hathaway v. Spooner*, 9 Pick. 26; *Eaton v. Campbell*, 7 Id. 10; 1 Stark. Ev. 368, note. This deed was not duly acknowledged, as an American consul was not a "magistrate" within the meaning of the stat. 1783, c. 37, sec. 4. Eliza Ann Scanlan could take nothing by a deed to Eliza Ann Castin: *Thomas v. Thomas*, 6 T. R. 671. And parol evidence was inadmissible to show who was intended. As Eliza Ann

Scanlan was a minor when this suit was commenced, she should have sued by her guardian or next friend.

Rand and Blake, for the petitioners, as to the competency of the registry copy, cited *Eaton v. Campbell*, 7 Pick. 10; *Hathaway v. Spooner*, 9 Id. 26; as to the sufficiency of the acknowledgment: Act of Cong. 1792, c. 24, secs. 2, 4, 9; 1 Kent Com. 42; Act of Cong. 1803, c. 62, sec. 9; 1 Chit. Commer. Law, 49; *The Bello Corrunes*, 6 Wheat. 156, note; Todd's Johnson's Dict., Consul; *Worcester v. Eaton*, 13 Mass. 377 [7 Am. Dec. 155]; to the point that Cheverus having become an alien, was disqualified to convey real estate in Massachusetts: 2 Kent Com. 42, 49; *Tulbot v. Janson*, 3 Dall. 133; *Murray v. The Charming Betsy*, 2 Cranch, 64; *United States v. Gillies*, 1 Pet. C. C. 159; *Sheafe v. O'Niel*, 1 Mass. 256; *Storer v. Balson*, 8 Id. 445; *Fox v. Southack*, 12 Id. 143; Shep. Touch. (by Preston) 56; as to the admissibility of parol evidence to explain the ambiguity in Fenwick's deed, *Hall v. Leonard*, 1 Pick. 30; Dick. on Tit. Deeds, 491, 501; *Shaw v. Loud*, 12 Mass. 447; *Leland v. Stone*, 10 Id. 459; 1 Phil. Ev. 513; *Richards v. Killam*, 10 Mass. 244; *Davenport v. Mason*, 15 Id. 90; *Brigham v. Rogers*, 17 Id. 574; *McGregor v. Brown*, 5 Pick. 170; to the point that the petitioners did not become seised because the husband was an alien and the wife a minor: Cru. Dig., tit. 32, Deed, c. 2, secs. 28, 31; to the point that the incompetency of the petitioners to commence this suit should have been pleaded in abatement: *Sewall v. Lee*, 9 Mass. 363; *Martin v. Woods*, Id. 377; *Ainslie v. Martin*, Id. 454; *Hutchinson v. Brock*, 11 Id. 119; *Langdon v. Potter*, Id. 313; Jack. on Real Act. 160; Stearns on Real Act. 106; *Blood v. Harrington*, 8 Pick. 552; *Schemerhorn v. Jenkins*, 7 Johns. 373; to the point that the petition was rightly brought by the husband and wife: Bac. Abr., Guardian, E; 2 Dane Abr. 10, sec. 4, 39, sec. 1; and to the point, that under this issue only the question of seisin can be tried: Roscoe on Real Act. 219; Co. Lit. 31 b; *Anon.*, Dyer, 41 a; *Anon.*, 1 Leon. 86.

By Court, SHAW, C. J. The petitioners pray for partition, and set forth title to one undivided half of the premises described, as claimed in right of the wife, and several exceptions are taken by the respondent to the title of the wife.

1. The seisin of Andrews and wife being conceded, the conveyance to Bishop Cheverus vested the estate in him. The first question arises upon the evidence offered to prove a conveyance from Bishop Cheverus to Bishop Fenwick, which was a copy

from the registry of deeds. It was objected, that as the grantee was within the jurisdiction of the court, he should have been summoned to produce the deed. But this objection can not be sustained. In the case of *Eaton v. Campbell*, 7 Pick. 10, this point was fully considered, both upon principle and practice, and the rule was established that the copy of a deed from the registry is good evidence *prima facie*, and dispenses with the production of the original, except where a grantee relies on the immediate deed to himself, or where, from the nature of the conveyance, the deed is presumed to be in his own custody or power.

2. The next question is, whether this deed was rightly admitted to be registered in this county, it being objected that it was not acknowledged by the grantor, conformably to the statute. This statute requires that the deed be "acknowledged by the grantor, before a justice of the peace in this state, or before a justice of the peace or magistrate of some other of the United States, or in any other state or kingdom wherein the grantor or vendor may reside at the time of making and executing the deed." This deed purports to have been acknowledged before D. Strobel, Esq., consul of the United States for the city of Bordeaux, in France; Bishop Cheverus, the grantor, then residing at that place. The question is, whether an American consul is a magistrate within the meaning of the statute.

It is difficult to fix any definite meaning to the word "magistrate," a generic term importing a public officer, exercising a public authority; it was intended, we think, to use a term sufficiently broad to indicate a class of officers exercising an authority similar to that of justices of peace in our own state, or as nearly so as the difference in the forms of their governments and institutions would permit. It was to provide for the execution and acknowledgments of deeds, in all foreign countries. It may be remarked, as a circumstance of some consideration, that the acknowledgment is to be before some justice of the peace or magistrate in any other state or kingdom, not of any other state.

There is nothing to indicate what kind of magistrate was intended, except the nature of the act to be done and the connection in which the term is used. The act is a ministerial one; it is to be before a justice of the peace or magistrate. The maxim *noscitur a sociis* applies. It must then be a ministerial officer, exercising like powers with those of a justice of peace in this commonwealth, when acting in his ministerial capacity. Such

an officer, we think, is a consul in a foreign country, at least in respect to the persons and interests of the country from which he is sent. An American consul in France derives his authority, in effect, from both governments; he has his commission from the United States, but his *exequatur* from France; and it is, in truth, in virtue of the authority vested in him by the latter, that he exercises any official authority within the territorial limits of the latter: *The Bello Corrunes*, 6 Wheat. 156, note; 1 Chit. C. L. 48.

This view is somewhat confirmed by the statute law of the United States, act of congress 1792, c. 24, sec. 2, which provides, that consuls shall have right in their posts or places to which they are appointed, of receiving the protests and declarations which masters, etc., who are citizens of the United States, may choose to make there, and also such as any foreigner may choose to make before them, relative to the personal interest of any citizens of the United States. The same statute, sec. 9, provides, that the specific enumeration of powers therein expressed shall not be deemed to exclude such others as result from the nature of the office. An officer, authorized by the concurrence of both governments to exercise such powers in France, is, we think, a magistrate competent to take in France, and authenticate by his official act, the declaration of the grantor of a deed, that he has executed the same freely, as his act and deed, and that such acknowledgment so authenticated is sufficient to warrant the register of deeds in this commonwealth to record it.

3. In regard to the other objection, that Bishop Cheverus, by accepting a civil and ecclesiastical office in France, renounced his American allegiance, and so became an alien, and that therefore nothing passed by his deed, the consequence which is suggested would not follow if the fact were proved. Were he in all respects an alien, having been once well seised of an indefeasible estate, his conveyance would not be void; it would vest an estate in his grantee, subject only to be defeated by the government.

The other objections to the petitioner's title can not be sustained, especially when taken by a stranger, one who does not himself claim the same title. So far as the alienage of Thomas Scanlan is relied upon, as disabling him to join with his wife in this petition, it is in abatement only, and comes too late. If it be contended that he could not take and become seised jointly with his wife in her right, this is contrary to the rule of law, which is, that an alien may take, but can not hold, against the

government; he takes a defeasible estate, subject to escheat, at the suit of the government. But till office found, he is seised. If it be contended that on a feoffment to the wife, the husband becomes seised by act of law, and, as in case of descent, the law will not cast seisin of an estate upon one who can not hold it, the consequence would be that the wife would remain seised alone, and that she must petition by her husband as guardian or next friend, instead of joining with him in the usual form. But this would be mere matter of form, not affecting the title or merits of the case.

As to the deed being made to the female petitioner by the name which she bore before her marriage, we think it is the common case of a person known by different names. She bore the name of Eliza A. Castin till her marriage, and it appears that she was the person intended and understood by the grantor, that he used the name by which he had known her, and by which she had always been known till her marriage; and it does not appear that her marriage and change of name were known to Bishop Fenwick, who conveyed the estate to her in execution of a trust. We think it was no violation of the rule, which rejects parol evidence when offered to contradict or control a deed, to show that the petitioner was the person to whom the grant was made, that she was, in fact, known by her maiden name to some persons, and especially to the grantor, and that there was no other person claiming to bear the name used in the deed, or claiming title under it: *Hall v. Leonard*, 1 Pick. 27.

The circumstance of her being a minor and a *feme-covert* did not prevent the estate from vesting; where an estate is conveyed by deed poll to a minor or married woman, the estate vests, subject only to be divested in case she should disagree to it when discoverd and of full age.

Judgment on the verdict.

Cited in *Ward v. Fuller*, 15 Pick. 187, to the point that where the party relying on a deed is the grantee or the person entitled to its possession, he must produce the original, but any other person has a right to produce an office copy; and to the same point in *Barnard v. Crosby*, 6 Allen, 331; and in *Perkins v. Richardson*, 11 Id. 540, to the point that a registered copy of a deed is competent evidence when the original can not be obtained. In *Sharp v. Wickliffe*, 14 Am. Dec. 37, it was held that the recorder's certificate that a deed had been recorded pursuant to the requirements of the law, was sufficient to entitle the deed to be read in evidence without further proof of its execution.

The principal case was cited in *Palmer v. Stevens*, 11 Cush. 152, to the point that an American consul at a foreign port was a magistrate, within the meaning of the statute; and in *Learned v. Riley*, 14 Allen, 113, to the point

that the provision of the statute, that an acknowledgment may be made before any justice of the peace in this state, is not a grant or definition of jurisdiction in a judicial capacity, but a designation of the person before whom the ceremony of acknowledgment may be witnessed and certified.

In *Elmendorf v. Carmichael*, 14 Am. Dec. 86, it was held that inquest of office was absolutely necessary to divest an alien of lands acquired by purchase. See also note to that case, p. 97.

SPOUL v. HEMMINGWAY.

[14 PICKERNE, 1.]

LIABILITY FOR INJURY FROM TOWED VESSEL.—Where a vessel in tow of a steamboat employed in the business of towage, through the negligence of the master and crew of such steamboat, comes in collision with another vessel, the owner of the towed vessel is not liable for damages occasioned thereby.

ACTION on the case for damages occasioned by the defendant's brig coming into collision with the plaintiff's schooner. It appeared that at the time of the collision the plaintiff's schooner was lying at anchor near New Orleans, and that the defendant's brig was being towed in the rear of a steamboat employed in the business of towage on the Mississippi, the defendant having contracted with the master of the steamboat to tow the brig, and the steamboat having at the same time a ship lashed on each side of her. The evidence tended to show that the brig, without any negligence or unskillfulness of those in charge of her, collided with and injured the plaintiff's schooner through the negligence and bad management of the persons in charge of the towing vessel. The judge instructed the jury that the defendant was not liable for the negligence, unskillfulness, or misconduct of those in charge of the steamboat, and the plaintiffs excepted. Verdict for the defendant.

H. H. Fuller and W. R. P. Washburn, for the plaintiffs, claimed: 1. That the defendant having employed the master and crew of the steamboat to tow his vessel, they were for the time being his servants, and he was liable for their acts: *Yates v. Brown*, 8 Pick. 23; *Snell v. Rich*, 1 Johns. 305; *Stone v. Cartwright*, 6 T. R. 411; *Bush v. Steinman*, 1 Bos. & Pul. 404; *Fletcher v. Bradick*, 5 Id. 182; 2 Dane Abr. 511; *Nicholson v. Mounsey*, 15 East, 384; Code Napoleon, liv. 3, tit. 4, sec. 1384. 2. That regarding the master of the steamboat as the agent of the owner of the steamboat, the defendant was nevertheless liable on the ground that the principal is liable for the acts of sub-agents em-

ployed by his agent: 2 Kent Com. 210; *Matthews v. West London Water Works Co.*, 3 Camp. 403. 3. That public policy required that the defendant should be liable: *Bush v. Steinman*, 1 Bos. & Pul. 404; *Yates v. Brown*, 8 Pick. 23.

C. G. Loring, for the defendant, cited *Laugher v. Pointer*, 5 Barn. & Cress. 547; S. C., 8 Dow. & Ry. 556, and cases cited, and stat. 6 Geo. IV., c. 125.

By Court, SHAW, C. J. The plaintiffs contest the correctness of the instruction of the judge to the jury, and insist that the owners, officers, and crew of the steamboat, must be taken to have been, for the time being, the agents and servants of the defendant, intrusted with the navigation and management of his vessel, and therefore he is within the rule, that, where a stranger suffers damage, by the negligence or unskillfulness of another's agent or servant, the owner or employer shall stand chargeable for the damage.

This question has been ably argued, and it certainly must be considered as one not free from difficulty. The maxim, *respondet superior*, in such cases, is well settled; but the difficulty consists in determining what facts and circumstances, in legal contemplation, go to establish the relation of superior and subordinate, of master and servant, or employer and employee, in such a manner as to give effect and application to the rule. This greatly vexed question has been very much discussed, and there are two modern cases, in which it is believed that the authorities are fully reviewed and considered: *Bush v. Steinman*, 1 Bos. & Pul. 404; *Laugher v. Pointer*, 5 Barn. & Cress. 547; S. C., 8 Dow. & Ry. 556. The former was decided mainly on the ground that the defendant was the owner of the house, under repair by persons employed directly or indirectly by him, and that the damage arose from carelessness in placing the materials intended for those premises, on or near them, in such manner as to frighten the plaintiff's horse. It was decided principally on the ground, that the owner of real estate must be taken to be the employer of all those who are engaged in making repairs for him; and that, having the power to control and regulate the use of his own estate, he is bound to do it in such a manner that others may not be injured by the mode in which it is used.

In the other case, where the owner of a coach had engaged horses and a driver for the day, and the damage was occasioned by the negligence of such driver, the question was, whether the owner of the carriage, or the owner of the horses, was respon-

sible. The learned judges of the king's bench were equally divided, and there was great difference of opinion among the other judges who were consulted. Without attempting to trace the origin of this principle, or review the authorities, I shall refer to those two cases, as giving a full and comprehensive view of the argument and authorities, and proceed to state the decision of the court, upon the present question, with some of the reasons upon which it is founded.

The case of a vessel towed by a steamboat, is certainly new in its facts, and could not have been anticipated by the founders of the common law; but it is one of the advantages of the common law, that it depends upon plain, equitable, and practicable principles, adapted to all times and occasions, and broad and comprehensive enough to embrace new cases as they arise. The decision of this case, therefore, must depend upon the application of established principles and analogous cases.

The owners of a vessel or coach are held liable for damages to third persons, occasioned by the negligence or unskillfulness of those who are in the management of the ship or coach:

1. Either because they are engaged or employed by them, are subject to their order, control, and direction, and so are to be deemed, either generally or for the particular occasion, their servants.

2. Or in respect to their being engaged in the business or employment of the owners, conducting and carrying on such business for the profit or pleasure of the owners, by reason of which the acts done in the prosecution of such business shall be taken *civiliter* to be done by the employers themselves, and this whether the persons whose negligence is the cause of damage have been retained and employed by the principal himself, or by the procuration of others, employed by him for the purpose.

Tried by either of these principles, we think that the defendant is not responsible for damages attributable to the carelessness or want of skill of the master and crew of the towing vessel. They were not the servants of the defendant; were not appointed by him; did not receive their wages or salaries from him; the defendant had no power to remove them; had no power to order or control them in their movements; had no contract with them, but only through them, with the owners of the steamboat, for a participation in the power derived from the public use and employment of that vessel by her owners. After making such contract, it was perfectly in the power of the

owners of the steamboat to appoint another master, pilot, and crew, and the defendant would have had no cause of complaint.

3. Nor can the master and crew of the steamboat, in any intelligible sense, be considered as in the employment or business of the defendant any more than a general freighting ship, her officers and crew, can be considered as in the employment of each freighter of goods, or the master and crew of a ferry-boat in the employment of the owners of each coach, wagon, or team transported thereon.

The steamboat was engaged in an open, public, distinct branch of navigation, that of towing and transporting vessels up and down the Mississippi for a certain toll or hire, for the profit of the owners. The defendant seemed to have the same relation to the steamboat that a freighter has to a general ship, or a passenger to a packet. The defendant participated in the benefit but incidentally and collaterally; he did not share in the profits of the business, one which from its magnitude may well be called the trade of towing. Such a trade may be considered as much a public and distinct employment as that of freighting or conveying passengers.

The steamboat was in no sense in the possession of those whom she was employed to tow. If it is contended that the defendant is liable on the ground that the steamboat was, for the time being, in his possession, occupation, or employment, then it would follow that the defendant would be liable for the negligence of the officers and crew of the steamboat, as well whether the plaintiff's vessel was struck by the defendant's vessel, the *Burton*, as struck by either of the other vessels towed, or by the steamboat herself, which can not for a moment be contended.

The case may well be illustrated by considering the condition of one of the side vessels, firmly lashed to the steamboat, and governed wholly by its movements. The payment for the privilege of being thus moved or transported is precisely like freight paid for heavy luggage, timber or spars, for instance, carried in or upon a ship. The whole conduct and management is entirely under the control of the master and crew of the towing vessel in the one case, as it is of the freighting ship in the other. If collision takes place between the side ship, thus firmly lashed, and another vessel, it is as directly attributable to the steamboat and her officers and crew, as if the steamboat herself had come into collision with the other vessel. The towed ship is the passive instrument and means by which the damage is

done. But there is no difference, in this respect, between the condition of one of the side ships and a ship towed astern, except this, that on board the ship towed astern, by means of a cable, something may and ought to be done by the master and crew in steering, keeping watch, observing and obeying orders and signs, and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist, the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it. The jury were so instructed at the trial, and it was left to them to find whether the damage was caused by the negligence of the one or the other. Then supposing all duties faithfully performed on board the towed vessel, and the damage to be caused by the negligence or misconduct of the master and crew of the steamboat, there is no difference between the case of the side ship, which is wholly passive, and the ship astern, which is partially so.

The case most nearly resembling this, perhaps, is that of a vessel chartered, where for a certain time the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed and the crew engaged and subsisted by the owners, in which case it is held that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew: *Fletcher v. Braddick*, 5 Bos. & Pul. 182.¹

Under the circumstances of this case, the court are of opinion that the defendant is not responsible for damage arising from the negligence or unskillfulness of the master, officers, and crew of the steamboat; that the direction, in this respect, at the trial, was correct, and that there must be judgment on the verdict.

LIABILITY FOR INJURY CAUSED BY TOWED VESSEL.—In *Sturgis v. Boyer*, 24 How. U. S. 123, and *Jackson v. Eaton*, 7 Ben. 193, the foregoing decision is relied on as authority for the position that the master of a tug employed to tow a vessel, is the agent of the owners of the tug, and that, where a collision is caused by his carelessness, they are liable therefor. The case is cited on the same point in *Steamer Express*, Olcott, 260, 262, 263, 264, 268, and in 2 Sawy. 593. The rule by which to determine whether the owners of the tug or those of the towed vessel are liable for such an injury, is thus stated by Clifford, J., in *The Maria Martin*, 12 Wall. 44: "Whenever the tug is under the charge of her own master and crew, and in the usual and ordinary course of her employment undertakes to transport another vessel, which for the time being has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually em-

1. S. C., 2 New Rep. 182.

ployed, she is legally responsible for the navigation of both vessels. Cases arise, undoubtedly, where both the tug and the tow are jointly liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the master and crew of each vessel are either deficient in skill, omit to take due care, or are guilty of negligence in navigation. Where the officers and crew of the tow, as well as the officers and crew of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, may be liable for the consequences, according to the circumstances, as the one or the other or both jointly were either deficient in skill, or were culpably inattentive or negligent in the performance of their duties: *Sturgis v. Boyer*, 24 How. 121; *Sproul v. Hemmingway*, 14 Pick. 5."

LIABILITY OF EMPLOYER FOR NEGLIGENCE OF EMPLOYEES.—The principal case is recognized as an authority also, upon the general question as to when an employer, or master, is liable for injuries occasioned by the carelessness or want of skill of those in his employ, in *Earle v. Hall*, 2 Metc. 357; *Brackett v. Lubke*, 4 Allen, 140; and *Vermont etc. R. R. v. Fitchburg R. R.*, 14 Id. 470. In *Brackett v. Lubke*, 4 Allen, 140, it was held that one employing a carpenter to repair an awning over a public way, without any special contract as to price, time, or other terms, was liable for an injury to a passenger along such way, caused by the carpenter's carelessness in doing the work. Bigelow, C. J., stated the rule thus: "The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specified terms, in a particular manner, and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation, or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient. This distinction is recognized in the cases adjudged by this court: *Sproul v. Hemmingway*, 14 Pick. 1; *Stone v. Codman*, 15 Id. 299; *Hilliard v. Richardson*, 3 Gray, 349; *Linton v. Smith*, 8 Id. 147."

SCUDDER v. BRADFORD.

[14 PICKERING, 13.]

PRINCIPLE OF GENERAL AVERAGE will not be applied unless there has been a necessary and voluntary sacrifice of the property of one for the benefit of all concerned in the voyage, and the property which is to contribute was thereby saved from the impending peril.

PROPERTY SAVED MUST CONTRIBUTE, THOUGH AFTERWARDS LOST by another peril in the course of the voyage.

WHERE THE IMPENDING PERIL WAS MERELY DELAYED, but not averted by the sacrifice, there is no case for general average. Thus, where, by cutting away the masts, a vessel which was dragging her anchors was prevented from drifting on the rocks for an hour, but then drifted again and was lost, but part of the cargo was saved, the part so saved was held not liable in general average.

ASSUMPSIT to recover a sum of money as general average. The plaintiffs were the owners of the schooner *Champion*, which was wrecked, and the defendant had certain goods on board which were saved. It appeared that during a storm the vessel was drifting on certain rocks, when the master dropped both anchors. As she continued drifting, he cut away the masts and she then brought up. In about an hour she drifted again, and was cast upon the rocks, both cables being slipped by the master to let her go as high as she would. The ship was broken to pieces, but the defendant's goods were saved. Other facts are stated in the opinion. A nonsuit was entered, subject to the opinion of the whole court, as to the plaintiffs' right to recover.

Counsel for the plaintiffs cited *Potter v. Providence etc. Ins. Co.*, 4 Mason, 299; *Case v. Reilly*, 3 Wash. C. C. 298.

Peabody and Watts, for the defendant, cited Phil. on Ins. 342; Hughes on Ins. 294; 3 Kent Com. 187; Stephens on Av. 9, 17; *Whitteridge v. Norris*, 6 Mass. 131; *Bradhurst v. Columbia Ins. Co.*, 9 Johns. 9.

By Court, PUTNAM, J. The general rule, that where the property of one is sacrificed for the preservation of that of others, in the prosecution of a voyage, is familiar, but of somewhat difficult application. It must be proved that the sacrifice was necessary and voluntary; it must be intended for the safety of all concerned, and it must appear that thereby the property which is to contribute, was rescued from the imminent peril then impending. The property saved from the danger which was immediately threatened, shall be held to contribute, notwithstanding it may be lost by subsequent perils in the course of the voyage.

No vessel could be in greater distress and danger than the *Champion* was in, when the masts were cut away. It was the voluntary act of the master. It was the only thing which could be done to prevent shipwreck. It was done to save the cargo and ship, and the lives of those who were on board. There was a heavy swell of the sea, which was driving the ship with great violence towards the rocks. The wind was very light, and that also blowing towards the shore. In such circumstances, it would have been hazardous, if not impossible, to bring her on the stays; so that tacking was out of the question. They tried in vain by wearing ship to keep her off. They threw over their anchors, but they were dragged by the force of the sea. The only hope was, that by the cutting away the masts

the anchors might bring up the ship, and prevent her drifting toward the shore. If that measure had succeeded, this would have been a case for a contribution; but it did not succeed. In about one hour after the masts were cut away, the ship drifted and dragged her anchors, until she reached and was wrecked upon the rocky shore. It can not be affirmed that the property which was saved from the wreck was saved by the means of the cutting away the masts. The forlorn hope failed. There was no more benefit derived from cutting away the masts before she reached the shore, than from the slipping of the cables afterwards. It can not be said that the property was safe or saved during the short space of time that she was brought up. The sea continued to set and roll with violence towards the shore, until the anchors were dragged as before. It was one continued peril, which was not avoided by the voluntary destruction of the masts: Phil. on Ins. 342. If the anchors had brought up the ship after the masts had been cut away, and had held her until the then impending peril had ceased, and the ship had proceeded upon her voyage and been lost afterwards from other perils, the contribution would be due. For this, general average is to be paid once or oftener, although the ship should be finally lost on the same voyage by subsequent and distinct perils: Weskett, 31, tit. Average, sec. 16. To apply this rule: Suppose the claim should have been made within the hour that the anchors held the ship after the masts were cut away. The answer would be obvious. Wait, and see if the ship will ride out this perilous swell of the sea; if she does, then call for your average. If she does not, this well-intended damage to the ship must go for nothing, as no benefit or safety will be derived from it. The answer is certainly as good now as it would have been then. The sacrifice was of no avail, and can not be the legal foundation of a claim for contribution. What was saved, was saved *tanquam ex incendio*: Phil. on Ins. 342.

It is the opinion of the whole court that the judgment must be for the defendant.

TO WARRANT THE APPLICATION OF THE PRINCIPLE OF GENERAL AVERAGE, there must be a voluntary sacrifice of the property of one of those concerned in the voyage for the benefit of all: *Walker v. U. S. Ins. Co.*, 14 Am. Dec. 610, and note; *Teetaman v. Clamageran*, 22 Id. 127, and note. In *Gray v. Wain*, 7 Id. 642, the principle was held applicable to the voluntary stranding of a vessel to preserve the ship and cargo as far as possible. See, also, the note to that case. Not only must the sacrifice be voluntary, but it must be successful, as laid down in the foregoing decision. The danger encountered by the master by election must be a different one from that sought to be

avoided. It "must not be the very same danger, merely modified by acts done by the master in the performance of his ordinary duty in the navigation or management of the vessel, so to meet the impending peril as to diminish its effects as far as possible:" *Emery v. Huntington*, 109 Mass. 435, citing *Scudder v. Bradford*. It is cited also in *Dabney v. New England Ins. Co.*, 14 Allen, 310.

BRIDGE v. GRAY.

[14 PICKERING, 55.]

JUDGMENT ONLY PRIMA FACIE EVIDENCE, WHEN.—A judgment rendered in an action in which, among other counts, there was a general one for goods sold and delivered which might have included a particular account, is, when pleaded in bar of a subsequent action on that account, only *prima facie* evidence of a former recovery thereon.

EVIDENCE ALIUNDE IS ADMISSIBLE in such a case to show that the demand sued for was not considered in the former action.

RECEIPT MAY BE CONTROLLED BY PAROL EVIDENCE that it was given by mistake, or that a less sum was paid.

ADMISSION BY ONE PARTNER, AFTER DISSOLUTION of the partnership, that a particular debt of the firm was not paid, though a receipt had been given therefor, is evidence against his copartner, particularly where such admission is made by the active partner, who has been constituted agent to settle up the firm business.

ASSUMPSIT to recover the balance of an account for goods sold and delivered. The defendant Usher was defaulted. The other defendant, Gray, pleaded: 1. A former recovery. 2. Payment. 3. That the defendants were exonerated and discharged by the plaintiffs. At the trial in the common pleas, the defendant produced in evidence the record of a judgment of this court recovered by the plaintiffs against these defendants in October, 1826, for three hundred and nineteen dollars and seventy-eight cents, in an action where the declaration contained a count on a promissory note for two hundred and one dollars and twenty-two cents, a count on an account annexed for one hundred and ninety-two dollars and sixty-one cents, for other goods than those concerning which this action was brought, and several general counts for goods sold and delivered. The defendant claimed that the demand now in suit might have been adjudicated in the former action, as nothing appeared in the record to the contrary, and that therefore the judgment was a bar. The plaintiffs offered parol evidence to show that the present demand was not offered or passed upon in the former suit, and that no evidence was introduced upon the count for goods sold and delivered. This evidence was admitted against defendants' objection.

The defendant, in support of his second and third pleas, gave in evidence a bill of parcels of the same goods mentioned in the account now sued on, receipted by the plaintiffs thus: "Received payment by note." The plaintiffs, in rebuttal, offered a note which they claimed was the one referred to in the receipt. The amount specified in the margin was two hundred and forty-one dollars and twenty-two cents, the same as the amount of the bill of parcels; but the amount mentioned and promised to be paid in the body of the note was only two hundred and one dollars and twenty-two cents. The difference was the balance now sued for. It was admitted that the defendants, Gray and Usher, were partners at the time the goods now in question were sold to them, and it was proved that Usher was the active partner, in whose name the business was conducted, Gray being a dormant partner, but having informed the plaintiffs before the goods were sold, that he was a partner. It further appeared that Usher failed in 1826, the business was broken up, and the partnership effects seized and sold by creditors. The plaintiffs proved a declaration of Usher made in 1830, that the note referred to in the receipt was given by mistake for only two hundred and one dollars and twenty-two cents, and that the balance now in suit was justly due. The defendant objected that this was after the dissolution, but the plaintiffs insisted that there was no dissolution, or at least that they had no notice of it, and the objection was overruled. The jury were instructed, as to the first issue, that if the evidence showed that the present claim was not passed upon in the previous action, the judgment therein was no bar. The defendant excepted. Verdict for the plaintiffs.

H. H. Fuller, for the defendant, claimed, among other things, that Usher's declarations should not have been admitted, citing: *Brandram v. Wharton*, 1 Barn. & Ald. 463; *Atkins v. Tredgold*, 2 Barn. & Cress. 23; *Bland v. Haselrig*, 2 Vent. 151; *Tuttle v. Cooper*, 5 Pick. 414; *Hathaway v. Haskell*, 9 Id. 42; *Walden v. Sherburne*, 15 Johns. 409; *Baker v. Stackpoole*, 9 Cow. 433 [18 Am. Dec. 508]; 3 Kent Com. 25; *Levy v. Cadet*, 17 Serg. & R. 126 [17 Am. Dec. 650]; *Rootes v. Wellford*, 4 Munf. 215 [6 Am. Dec. 510]; *Chardon v. Oliphant*, 2 Const. Rep. 685; *White v. Union Ins. Co.*, 1 Nott & McC. 561 [9 Am. Dec. 726]; *Evans v. Duberry*, 1 A. K. Marsh. 189; *Ward v. Howell*, 5 Har. & J. 60; *Clementson v. Williams*, 8 Cranch, 72; *Thompson v. Peter*, 12 Wheat. 567; *Bell v. Morrison*, 1 Pet. 371.

J. G. Rogers, for the plaintiffs, on the same point, cited *Wood*

v. *Braddick*, 1 Taunt. 104; *Thwaites v. Richardson*, Peake, 16; *Grant v. Jackson*, Id. 203; *Evans v. Drummond*, 4 Esp. 91; *Lacy v. McNeil*, 4 Dow. & Ry. 7; *Bulkley v. Langdon*, 3 Conn. 76; *McIntire v. Oliver*, 2 Haws, 209 [11 Am. Dec. 760]; *Parker v. Merrill*, 6 Greenl. 41; *Van Reimsdyk v. Kane*, 1 Gall. 630; *Simpson v. Geddes*, 4 Bay, 533; *Norden v. Williamson*, 1 Taunt. 378; *Whitcomb v. Whiting*, 2 Doug. 652; *White v. Hale*, 3 Pick. 291 [15 Am. Dec. 209]; *Jackson v. Fairbank*, 2 H. Bl. 340; *Perham v. Raynal*, 2 Bing. 306; *Pittam v. Foster*, 2 Dow. & Ry. 363; *Smith v. Ludlow*, 6 Johns. 267; *Johnson v. Beardslee*, 15 Id. 3; *Shelton v. Cocke*, 3 Munf. 197; *Lowe v. Boteler*, 4 Har. & McH. 346 [1 Am. Dec. 410]; *Hunt v. Bridgham*, 2 Pick. 581 [13 Am. Dec. 458]. He contended that the fact that Usher was the only active partner gave his declarations still greater weight. If he had been sued alone he could not have pleaded the partnership, and a demand against him alone could be set off against a debt due the partnership: *George v. Clagett*, 7 T. B. 359; *Lord v. Baldwin*, 6 Pick. 348.

By Court, SHAW, C. J. This case comes before the court upon exceptions to the opinions of the chief justice of the court of common pleas, at the trial. Several exceptions were taken which have not been relied upon with much confidence; the attention of the court has been principally drawn to two questions.

On the issue joined upon the plea in bar of a former recovery, the defendant relied upon a judgment in a former suit, upon a writ containing, among others, counts for goods sold and delivered, and which might have embraced the goods sued for in the present action; but there was no specific enumeration or description of goods contained in these counts, nor any account annexed to the writ, or other specification filed, by which it could be shown that the goods in question in this suit were embraced in that. The defendant relied upon that judgment as a bar, and as conclusive evidence that the claim for goods sold, now made in this suit, must have been considered in the former. But the plaintiff offered evidence *aliunde* to show, in point of fact, that no claim was made in that action for the goods now sued for. We think that this evidence was rightly admitted. The modern mode of declaring, in most general use, is to insert several general counts, and when, in such case, the general issue is pleaded, a vast variety of different claims may be put in issue and tried, so various, indeed, that in most cases it is found necessary to call in the assistance of the court previously to the

trial, to require the plaintiff to give in a bill of particulars, or specification of the claims which he means to give in evidence, in order to apprise the defendant of the actual claims relied on, which the declaration does not do, to enable him to go to trial with any safety. When such a judgment is pleaded in bar, it seems to be liberal enough, and going as far in support of a judgment as experience will warrant, to consider it as *prima facie* evidence of a prior adjudication of every demand which might have been drawn into controversy under it, leaving it, like other *prima facie* evidence, to be encountered and controlled by any other competent evidence tending to show that any particular demand was not offered or considered. And so, we think, the rule is now settled by authorities: *Seddon v. Tu-top*, 6 T. R. 607; *Webster v. Lee*, 5 Mass. 334.

Supposing the evidence rightly admitted, it was left to the jury, with proper instructions, to consider its weight, and decide the question of fact.

But the most material question is, whether the admissions of Usher, after the period at which, as it is alleged, the partnership was dissolved, ought to have been received in evidence to show that the note given in payment for the goods sold was erroneously given for two hundred and one dollars and twenty-two cents, instead of the sum of two hundred and forty-one dollars and twenty-two cents, the actual amount of the bill, and the sum for which the note was intended to be given.

No objection was taken to this evidence as having a tendency to control or contradict the written evidence of the receipt; it being a well-established exception to the general rule upon that subject, that a receipt may be controlled by parol evidence, showing that a less sum was paid, or that the receipt was given by mistake.

But the main question discussed is, whether on the trial of the issue against Gray, the defendant who pleaded the admissions of Usher, the other defendant, that the account was not paid, and that the note was given by mistake, were competent evidence. The court are of opinion that this evidence was admissible. It must be considered as a general rule, that upon each joint contract, the admissions of each joint debtor as to the existence, payment, and settlement of the joint debt, is admissible to bind the joint debtor, and to many purposes, the character of joint debtors being once established, must be deemed to continue until the debt is paid, or by some other means legally canceled, barred, or discharged.

This case is entirely distinguishable from that of the acknowledgment of one partner, after a dissolution, taking a case out of the operation of the statute of limitations. To produce this effect, the law requires proof of a new promise within six years, and an admission is only evidence from which a jury may infer such new promise. Now, it may well be argued (of this, however, we give no opinion), that the power of binding partners by a new promise does not exist after a dissolution, by which the mutual power of partners to bind each other by contract has been revoked; and yet that after a joint liability has been shown, each may make binding acknowledgments and admissions as evidence affecting the existence of that joint liability.

The existence of the partnership must be proved by evidence other than such admissions, before the admissions are evidence against the partners: *Tuttle v. Cooper*, 5 Pick. 414. But when the partnership is proved, and a contract falling within the scope of that partnership, which is of course a joint contract of the partners, the act of each in regard to the payment or discharge of such joint contract, binds the whole. Each has a right to the custody of the partnership goods and effects, and to the application of them to any of the purposes of the partnership, each may collect and receive debts due to the firm, and give a good discharge or release, each would have power to bind the partnership by payment of a joint debt out of the partnership funds, which implies the power of judging and determining upon the question of the existence and non-payment of such debts; and why, then, should he not be able to bind them by equivalent acts? But if it be true generally that the act of each partner in this respect binds the whole, *a fortiori* shall the act of the ostensible and managing partner have that effect.

Indeed, it is not necessary to decide this case solely upon the general ground stated, because there is another growing out of the circumstances of the present case, which appears to me quite clear of difficulty. The defendant Gray was strictly a dormant partner, and the whole of the business was done by and in the name of Usher. He made all purchases, payments, and settlements, and no notice of dissolution of partnership was given. Under these circumstances, Usher may be considered as the agent for the partnership for the payment and adjustment of all demands, until the settlement and close of the joint concern. Where a notice of dissolution is given, and one partner is referred to, as authorized to make all settlements, and a creditor applies to the party thus referred to, the acts and

statements of the partner thus constituted agent to the creditor thus applying, would be binding on the partners. It is analogous to the case of a person applied to for payment of a debt; if he refers the applicant to his attorney, whatever is said by the attorney thus referred to, is evidence against the party making such reference. Here the facts, showing how the business was conducted, justify the inference that by mutual consent, Usher was constituted the agent to settle and close this partnership concern, even if he had not the authority simply as partner.

The court are of opinion that the evidence was properly admitted, and that the instructions to the jury were correct; the exceptions are therefore overruled, and the judgment of the court of common pleas affirmed.

PAROL EVIDENCE TO EXPLAIN OR CONTRADICT A RECEIPT.—See *Ensign v. Webster*, 1 Am. Dec. 108; *Frisler v. Williamson*, Id. 396; *Tobey v. Barber*, 4 Id. 326; *Grier v. Huston*, 11 Id. 627; *Raymond v. Roberts*, 16 Id. 698, and note.

ADMISSIONS BY A PARTNER AFTER DISSOLUTION.—As to the competency and effect of such admissions generally as evidence against the other partners, see *Brady v. Hill*, 13 Am. Dec. 503; *Baker v. Stackpoole*, 18 Id. 508, and cases cited in the note thereto; *Barringer v. Sneed*, 20 Id. 74, and note; *Cady v. Shepherd*, 22 Id. 379. Concerning the effect of such admissions with respect to preventing the running of the statute of limitations upon a partnership debt, or with respect to reviving debts barred by statute, see the note to *Chardon v. Oliphant*, 6 Am. Dec. 575; *McIntire v. Oliver*, 11 Id. 760, and note; *Coit v. Tracy*, 20 Id. 110. As to the power of a partner generally to bind his copartners by acts done after the dissolution of the partnership, see *Lansing v. Gaine*, 3 Am. Dec. 422; *Rootes v. Wellford*, 6 Id. 510; *White v. Union Ins. Co.*, 9 Id. 726; *Price v. Towsey*, 14 Id. 81; *Graves v. Merry*, 16 Id. 471.

EAGER v. ATLAS INS. CO.

[14 PICKERING, 141.]

WHERE AN INSURED VESSEL HAS BEEN REPAIRED, after a partial loss, the insurer is liable only for the balance of the expense thereof, after deducting the value of old materials not used, and one third of the residue, new for old.

USAGES OR CUSTOMS OF PARTICULAR PLACES ARE NOT BINDING unless the parties contract in reference to them, and if the contract be in writing, the reference ought to appear by its terms.

COURTS TAKE NO NOTICE OF LOCAL USAGES, but they must be proved like other facts, and, necessarily, by parol evidence.

LOCAL USAGE TO DEDUCT ONE THIRD NEW FOR OLD from the gross expense of repairs, will not control in construing a policy which does not refer to such usage.

SUCH A USAGE IS OPPOSED TO THE RULE of law on that subject, and to the essence of the contract of insurance.

CONTRACT OF INSURANCE IS ONE OF INDEMNITY and nothing more.

ASSUMPSIT on a policy of insurance on the ship Grecian for a partial loss. Upon a case stated, it appeared that the ship had been cast ashore and injured, and afterwards repaired. The question at issue was whether, in adjusting this loss, the defendants should be allowed a deduction from the gross expense of the repairs of one third new for old, or whether this deduction should be made from the net cost of the repairs after deducting the value of materials saved. The defendants insisted on the former rule, and the plaintiff on the latter, and it was agreed that if the plaintiff's view was correct he should have judgment for a certain sum, in addition to what the defendants were willing to pay. Other agreed facts relating to a certain usage in the city of Boston, and the terms of the policy, are stated in the opinion. The case was submitted on the opinions of Benjamin R. Nichols, Willard, Phillips, and Charles Jackson, published in 5 Am. Jur. 262; Id. 252; and 6 Id. 45, and a written opinion of William Prescott, as well as upon *Byrnes v. National Ins. Co.*, 1 Cow. 265; *Dickey v. New York Ins. Co.*, 4 Id. 222, 245; 3 Kent Com. 283; *Brooks v. Oriental Ins. Co.*, 7 Pick. 259.

S. Hubbard, for the plaintiff.

Fletcher and Cooke, for the defendants.

By Court, WILDE, J. This case is submitted to our consideration, upon an agreed statement of facts, for the purpose of obtaining a revision of one of the points decided in the case of *Brooks v. The Oriental Insurance Company*; and as that decision was made without a very full discussion, though certainly not without consideration, we have very willingly re-examined the subject. But after fully considering the arguments and opinions to which we have been referred, in which the question is discussed with great ability, and after due deliberation, we have been unable to perceive any sufficient reason for overruling our former decision; on the contrary, a more close and thorough examination of the principles and the reasons of that decision has rather tended to strengthen and confirm our confidence in its correctness.

The question to be reconsidered is, whether, in adjusting a partial loss on a vessel, after repairs made, the deduction of one third from the whole expenses of the repairs is to be made

for the substitution of new material and work for old; or whether the proceeds of the old materials not used in the repairs should be first deducted, and the one third be taken from the residue.

Another question arises from the facts agreed which was not considered in the case of *Brooks v. The Oriental Ins. Co.*, and which depends on the usage of the insurance offices in Boston and "the rules and customs of assurance" referred to in the policy. This question, if determined in favor of the defendants, will be decisive, and we have therefore attentively examined the grounds on which it appears to us to depend. The result of the examination I will now briefly state.

It is agreed by the parties that at the time of the underwriting the policy, and at the time of the loss, it was the usage of the insurance offices then existing in Boston, in adjusting a partial loss, to deduct one third new for old from the gross amount of the expenses of repair. And it appears by the policy, that in the clause enumerating the perils insured against, after specifying the seas, fire, enemies, etc., there is added, "and all other losses and misfortunes which have or shall come to the damage of the said ship, to which insurers are liable by the rules and customs of insurance in Boston." The defendants' counsel contend that this clause in the policy, coupled with the usage before stated, must so control the construction of the contract as to settle the present question in their favor, whatever may be the general rule of law as to the adjustment of similar losses in other cases.

That a local usage, as well as general usages of trade, may materially affect the construction of a contract, can not be denied; but to have this effect, such usage must appear to be so well settled, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that the contract was made in reference to it. Such a presumption is the only basis on which any local or particular usage can be sustained, so as to affect the construction of a contract. The usages or customs of particular places are not binding, unless the parties contract in reference to them, and if their agreement be reduced to writing, the reference ought to appear by the terms of the contract. To allow particular usages to control or vary the construction and legal effect of a written contract, would be repugnant to the rules of evidence, and might be followed by perilous and mischievous consequences. Courts take no notice of these local and particular usages; they are to be

proved like other facts, and necessarily by parol evidence: *Gordon v. Little*, 8 Serg. & R. 557 [11 Am. Dec. 632]; *Snowden v. Warder*, 3 Rawle, 103; *Smith v. Wright*, 1 Cai. 44 [2 Am. Dec. 162]. But if parol evidence were admissible, and particular usages might control or vary the construction of a written contract, an insuperable objection to the defense, so far as it depends on the question of usage, would remain. For whatever may have been the usage, and however well known, it can have no effect on the contract, unless it was adopted by the parties, and the contract was made in reference to it; of this there is no proof nor ground of presumption; on the contrary, the terms of the contract strangely rebut any such presumption.

It has been already remarked, that the rules and customs of insurance in Boston are expressly referred to in the policy, but for a purpose foreign to the present question. That reference was introduced for the purpose of designating the perils insured against, and of supplying any omission in the list of those which are enumerated; but it has no relation to the mode of adjusting a partial loss. There are stipulations in the policy touching partial losses, but none in respect to the question now to be considered. This question had been settled in New York, years before this policy was underwritten, and for some time before had been pending in this court for decision. From these and other circumstances, the presumption is strong, that the parties did not treat, as to the mode of adjustment, on the basis of usage, but on that of the existing law, however it might be decided. When the contract refers to "the customs and rules of insurance in Boston," and specifies how far they shall constitute a part of the contract, it must be inferred that the parties did not intend that it should be affected thereby, beyond the extent specified; especially as the form of the policy was, no doubt, settled and adopted with great care and deliberation.

These considerations appear to us quite sufficient to settle the question of usage, but other considerations might be added, if necessary. The usage relied upon by the defendants is opposed to the essence of the contract of insurance, which is a contract of indemnity. That the usage, if applied to the contract, would deprive the insured of a full indemnity, and give to the underwriters an unreasonable advantage, I shall endeavor to show, in discussing the principal question. The usage is also opposed to the rule of law, as we understand it, by which partial losses, when vessels have been repaired, are to be adjusted.

The rule of deducting one third new for old, probably originated in usage, but it has been long known and settled in the commercial world, and has been adopted by courts, so that it is now a well-settled principle of law. Now it seems to me very clear, that no particular usage opposed to the established principles of law can be sustained. And so it was decided in the case of *Homer v. Dorr*, 10 Mass. 26. The insurance was on property laden on freight from Boston to Archangel and back to Boston, taking the risk on shore as well as on board. In an action on the premium note, it was held that the whole note was recoverable, although no property was returned in the ship; and it was proved to be the universal usage in Boston, where the insurance was effected, to return a portion of the premium in such cases. Again, if local usages are to be admitted to control the rule in question, the object and intention of the rule will be defeated. It was adopted for the sake of convenience, and to avoid the difficulty of ascertaining the relative value of the new and old materials; but there would be less difficulty in ascertaining this than there would be to settle the various usages that might spring up in different ports, if every local usage were allowed to control the principles of law. In Boston the one third new for old might be deducted from the gross expenses of repair; in Salem the proceeds of the old materials might be first deducted, and in some other port some other modification might be introduced, either by increasing or diminishing the rate of deduction, so that we might have as many different usages and laws as there are ports in the commonwealth. Instead, therefore, of having a simple, certain, and convenient rule for our guide, we should have to consult and ascertain these local usages, and to conform to the various changes and fluctuations in them which circumstances might from time to time introduce. These local usages may be useful, and are admitted to explain the intention of parties, where there is reason to presume that the contract was made in reference to them; but to suffer them to prevail so as to sap the foundation of a well-established rule of law, would be going too far. In the present case, however, it is not necessary to determine how far particular usages may be binding, or explanatory of contracts or of the rules of damages; it is sufficient to decide, that they can have no effect upon any contract, unless by the consent of the contracting parties, either express or implied. No such consent appears in this case, and it can not be

presumed for the reasons already stated, and this seems to be decisive as to the question of usage.

The remaining question is more important, and more involved in doubt and difficulty. The arguments and opinions opposed to the decisions in *Byrnes v. National Ins. Co.*, 1 Cow. 265, and in *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, which have been recently published, are undoubtedly entitled to great consideration; still, however, we continue to think that those decisions are sustained by the most weighty and convincing reasons.

All agree that the contract of insurance is one of indemnity, and that this is in truth the essence of the contract. The assured are entitled to a full indemnity from the underwriters, and nothing more. That rule therefore is the best, which will, in the settlement of the loss, most fully and exactly fulfill this principal intention of the contract. It is also admitted that the rule of deducting one third new for old, however construed, will not always secure an exact indemnity. The assured will recover more or less than an indemnity, according to the age and state of the vessel before the loss, but this imperfection of the rule is supposed to be more than compensated by its certainty, simplicity, and practical convenience. Before the introduction of the rule, the relative value of the new and old materials was ascertained by appraisement in each case; and the difference between the cost of the new materials and work, and the value of the old materials at the time of the loss, was deducted, leaving the balance for which the insurer was liable. This being found inconvenient, and it being difficult to ascertain the value of the old materials with accuracy, the rule of deducting one third new for old was long since substituted for the ancient mode of adjustment, and its continuance for such a length of time proves its practical utility. Since the introduction of the rule, neither party can question the relative value of the new and old materials, whether the rule in a particular case should afford an exact indemnity or not. Thus far the parties are bound by the rule, but no further. This, like all other general rules, when applied to a multiplicity of cases, will not always do exact justice, but it should be so applied as to do as little injustice as possible. It will not do to say, that because a rule of necessity produces some unjust results in particular cases, it should be so applied as to produce other similar results without necessity; and that such must be the effect of the rule contended for by the defendants' counsel, can not, we think, well be doubted.

Let us suppose, for example, that the vessel parts her cable

in a storm, but that a part is saved, which is sold for two hundred dollars, and that a new cable is purchased which costs three hundred dollars. If one third is deducted from the full price of the new cable, this balances the account, and the assured is entitled to no indemnity. If the part of the old cable saved should sell for two hundred and fifty dollars, the assured, in stating an account, would become indebted to the underwriters fifty dollars, and so whenever the old materials sell for more than two thirds of the amount of the expenses of repairs, a balance will be found in favor of the underwriter. Whether he can claim it or not is not the question; or is it any good answer to the objection resulting from the unjust operation of the rule, to say that such cases will but rarely occur; for a result so unjust and so manifestly opposed to the spirit of the contract of insurance ought never to occur. But without supposing extreme cases, it seems to me that generally the assured will not receive full indemnity if a third new for old is to be deducted from the whole expenses of repairs, without first deducting the salvage. The salvage is no part of the loss, and belongs to the assured; the amount of that, therefore, ought to be withdrawn from the operation of the rule, or the assured will fail to recover a full indemnity. It is said that the assured, by such a rule, would recover more than an indemnity, and that injustice would be done to the underwriter. For instance, if the expenses of repairs amount to six hundred dollars, and the old materials sell for two hundred dollars, then it is said the assured would be fully indemnified by the recovery of two hundred dollars, the increased value by the new materials being two hundred dollars, as assumed by the rule; whereas, by first deducting the proceeds of the old materials, and then deducting one third from the residue, the assured would recover two hundred and sixty-six dollars and sixty-seven cents, being sixty-six dollars and sixty-seven cents more than a full indemnity. But there is a fallacy, we think, in this objection and statement.

It is true that the vessel is made better by the repairs, but it by no means follows that the whole amount of the increased value is to be credited to the underwriter. So far as he contributes to the expenses of the repairs, he should be credited for the increase value, but no further. Now, the underwriter has no concern with the expenses of repairs which are defrayed by the old materials. So far as these go, the subject repairs itself, and thus far there is no claim for indemnity. The further disbursements required to repair the loss are to be made at the

expense of the underwriter, and on these expenses he is entitled to a deduction of one third; but there seems to be no good reason for extending the rule beyond these limits.

In the case last supposed the adjustment would be thus stated:

Whole expenses of repairs.....	\$600 00
Deduct expenses paid by the proceeds of the old materials, those being the property of the assured, 200 00	
	<hr/>
	\$400 00
The remaining disbursements being made at the expense of the underwriter, he is entitled to a deduction of one third new for old.....	133 33
	<hr/>

And he is chargeable with the.....\$266 67

Which gives generally to the assured a full indemnity, and no more. There may be some exceptions, but in adopting a general rule of decision we are to look at general results.

But it is denied that the old materials are the property of the assured; it is, however, difficult to conceive how and when, before the adjustment of the loss, the property in the assured becomes divested and vested in the underwriter. It is said that if the underwriter pays the full amount of the loss, the old materials become his property; that if a cable is lost, and afterwards the loss is adjusted, and the underwriter pays, the old cable, if recovered, would become the property of the underwriter. And so, if part of a cargo is lost, and the loss is paid by the assurer, the lost articles, if recovered, would belong to him. This may well be admitted without affecting the question under consideration, for, until an adjustment is made, the old materials continue to belong to the assured, and if they are disposed of, and the proceeds are applied to the purchase of new materials, the underwriter, as to that part of the expenses of the repairs, can have no claim to an allowance for the increased value. The repairs made by means of the salvage, constitute no part of the loss, and can not be charged against the insurer; the old materials therefore clearly belong to the assured.

But a weightier objection to our former decision remains to be considered. It is said to be immaterial to whom the old materials belong, or who pays the disbursements for repairs, because, at all events, the ship is made one third better by the

repairs, and therefore one third of the gross expenses should be deducted, or the assured will receive more than an indemnity. And this would be true if the fact were that such would be in all cases the increased value, or if the presumption is to be carried to the extent the objection supposes. But presumptions against facts, established for convenience, are to be strictly guarded, and a rule founded on such presumptions is to be confined to the purposes for which it is adopted. Now, it has been already remarked that the rule in question was adopted to avoid the difficulty and uncertainty of ascertaining the loss and the amount of indemnity therefor by appraisement in each particular case.

This rule was founded on the supposition or presumption that generally the new materials are one third better than the old. The question, then, is, how far this presumption is to be carried out, and to what portion of the repairs the rule is to be applied. We understand the rule to be that one third is to be deducted from the expenses of repairing the loss, and that the loss is the injury done to the vessel which remains after the proceeds of the old materials have been applied. This is the loss against which the underwriter stipulates to indemnify the assured, and so it was considered before the introduction of the existing rule: 1 Magens, 193. The rule, therefore, and the presumption as to the relative value of the materials, are to be confined to the portion of the repairs remaining after crediting the old materials. These go to reduce the cost of repairs, the underwriter being only chargeable with the difference between the proceeds of the old materials and the cost of the new; and the amount of the difference is the amount paid to repair the loss, on which the deduction of one third new for old is to be made.

This, on the whole, as we think, is much the most equitable rule of adjustment, and best adapted to secure, as nearly as any general rule can, exact indemnity; and commonly it will not be found too favorable to the assured; whereas the rule contended for by the defendants might lead to injustice and even absurdity; or to a train of exceptions which might be very embarrassing.

Judgment for the plaintiff.

IN ADJUSTING A PARTIAL LOSS AFTER REPAIRS IN NEW YORK, the insurers were held, in *Dunham v. Commercial Ins. Co.*, 6 Am. Dec. 374, to be entitled to a deduction of one third new for old, notwithstanding the fact that the vessel was new when she sailed on that voyage; and that it was her first voyage, there being a usage to that effect. As to the rule requiring the do-

duction of the value of old materials not used, from the gross expense of the repairs in such a case, the principal case is referred to incidentally in *Dunham v. New England Mut. Ins. Co.*, 1 Low. 257.

USAGES.—Concerning the admissibility of evidence of a usage to explain a written contract, see *Avery v. Stewart*, 7 Am. Dec. 240; *Allegre v. Maryland Ins. Co.*, 14 Id. 289; S. C., 20 Id. 424, and note; *Thompson v. Hamilton*, 23 Id. 619; *Farrar v. Stackpole*, 19 Id. 201. As to when a local usage is to be deemed to have entered into and become part of a contract, and when not, see the note to *Jordan v. Meredith*, 2 Id. 374; *Stultz v. Dickey*, 6 Id. 411; *Lincoln etc. Bank v. Page*, Id. 52. To be valid, a usage must be reasonable: *Jordan v. Meredith*, 2 Id. 373; *Barksdale v. Brown*, 9 Id. 720. Concerning the admissibility of evidence of a local usage as to the place of delivery in contracts with common carriers, see *Ostrander v. Brown*, 8 Am. Dec. 211. A usage opposed to legal principles can not be sustained: *Dickinson v. Gay*, 7 Allen, 33, citing *Eager v. Atlas Ins. Co.* Where there is conflicting evidence as to a usage, it can not control the established legal construction of a written contract: *Thwing v. Great Western Ins. Co.*, 111 Mass. 109, also citing the principal case. As to what evidence is sufficient to show that a contract of insurance was made with reference to a usage so as to render it binding, the case is referred to as an authority in *Parsons v. Manufacturers' Ins. Co.*, 16 Gray, 470. So to the point as to what constitutes an unreasonable usage, in *Sturgis v. Cary*, 2 Curt. 385. It is cited also in *Matheson v. Equitable Marine Ins. Co.*, 118 Mass. 214.

HARTEAU v. HARTEAU.

[14 PICKERING, 181.]

WHERE A CAUSE OF DIVORCE AROSE IN ANOTHER STATE, in which the parties at the time resided, and in which the husband has since continued to reside, but the laws of that state do not admit of divorces for such cause, the courts of this state have no jurisdiction to decree a divorce on that ground after the wife's removal here, although the parties resided here at the time of their marriage.

WIFE MAY HAVE A SEPARATE DOMICILE from that of her husband for the purpose of suing for a divorce.

PLACE WHERE THE MARRIAGE WAS CELEBRATED seems to be of no importance in suits for divorce.

LIBEL for a divorce on the ground of adultery, desertion, and cruel neglect by the husband. The facts were, that the parties were natives of this state, and were married here, but after some years removed to New York, and during their residence there, the alleged desertion and neglect occurred. The plaintiff then removed to this state, and brought this suit, the defendant being still a resident of New York. Desertion and cruel neglect are not causes of divorce in New York, but a divorce *a mensa et thoro* may be granted for that cause in this state by statute 1785, c. 69, sec. 3, and statute 1810, c. 119. The statute of 1785 also provides that "all questions of divorce and alimony

shall be heard and tried by the supreme judicial court, holden for the county where the parties live, and that the decree of the same court shall be final."

Jones, for the libellant.

Filley, for the libelee.

By Court, SHAW, C. J. The ground of defense to this libel is, that the parties were not within the jurisdiction or limits, nor subject to the laws of the commonwealth at the time of the act done, which is relied on as the cause of divorce.

We consider it to be proved that these parties had *bona fide* changed their domicile, and become citizens of the state of New York, before the desertion charged. Such being the fact, it seems to us to be the same case as if they had never been inhabitants of this commonwealth. As such, it seems to fall within the principle of the cases of *Richardson v. Richardson*, 3 Mass. 153; and *Hopkins v. Hopkins*, 3 Id. 158. The true ground of argument, in this case, is, not that the parties did not live in this county, but they were not then subject to the jurisdiction of the court, and their conjugal rights and obligations did not depend upon the operation of our laws.

The right to a divorce, and the cases in which it shall be granted, are regulated by the stat. 1785, c. 69, sec. 3. The seventh section regulates the place where the trial shall be had. It appears from the preamble to this section, that two objects were to be accomplished by this act: 1. To transfer the jurisdiction from the governor and council to the supreme judicial court; and, 2. Which resulted as a consequence from the other, to have the hearing in the several counties, instead of requiring all persons to attend at Boston, as they must when the jurisdiction was in the governor and council.

The term live, in this section, it appears to me, must mean where the parties have their domicile when the libel is filed or the suit commenced.

To test this, suppose parties live as man and wife in Suffolk, and adultery is committed by the husband, but it is unknown to the wife. They remove into Middlesex *bona fide*, and whilst residing there the adultery is discovered. Must the wife libel in Suffolk? It may be said the fact was committed there; but the rule of locality, applicable to a trial for crime, does not apply. Suppose, in the above case, that whilst living at Boston, the husband had committed the offense in Providence, out of the jurisdiction of Massachusetts. Would not this be as much

a good cause of divorce for the wife, as if done within the jurisdiction? The fact is to be tried, not because it is a violation of the law of the commonwealth, which the state has a right to punish, but because it is a violation of the conjugal obligation, contract, and duty.

The wife is, in such case, entitled to a divorce; and if she continues to reside in the same county, her libel would properly be brought in that county, though the parties do not live therein, within the literal construction of the statute. But suppose in the mean time, from necessity or otherwise, she has taken up her abode in another county, she still has a right to a divorce, and the question is, in what county shall she file her libel? Neither of the parties now lives in the county where they formerly lived together. It would seem to be a good compliance with the requisition of the statute, which can not be construed literally, to construe it *cy pres* and permit her to file her libel in the county where she has her abode at the time: *Lane v. Lane*, 2 Mass. 167. The statute directs that the suit shall be brought in the county where the parties live, for two reasons, to save expense, and because the truth can be better discerned. This would in general be true, not only because often the fact would be done at such place, but also because the parties would there be better known. It clearly does not limit the place of trial to the county where the fact was committed, because that is often out of the state, or in the state, but in a county other than that where the parties live.

Much obscurity has, we think, been thrown on the subject, by confounding the two questions, which are essentially different, viz.: 1. In what cases a party is entitled to claim a divorce; and 2. In what county the libel should be brought.

As it is a right conferred by statute, the one question may sometimes depend on the other; for if by the terms of the statute no suit can be instituted, it is very clear that no divorce can be had.

But I think there may be cases where the statute confers a right to have a divorce, in which the statute gives a general jurisdiction to this court, and yet where the parties do not live, that is, have their domicile, either at the time of the act done, or at the time of the suit commenced, in any county in this commonwealth. If so, there are cases where the statute can not be literally complied with, and must be construed *cy pres* according to the intent.

Suppose a husband commits adultery and then purchases a

house, and actually takes up his domicile in another state, but before his wife has joined him, she is apprised of the fact, and immediately files a bill for a divorce, and obtains an order to protect her from the power of her husband, as by law she may. He is an inhabitant of another state, and can in no sense be said to live in any county in this state, and yet it would be difficult to say that she is not entitled to have a divorce here.

Supposing, instead of the last case, he has actually purchased a house, and changed his domicile to another state, and there commits adultery, and the wife, not having joined him, and not having left her residence in this state, becomes acquainted with the fact, and libels, and obtains a similar order, could she not maintain it? Yet in the latter case, at the time of the act done, and in the other, at the time of the suit instituted, the respondent, one of the parties, certainly did not live in any county of this commonwealth.

This suggests another course of inquiry, that is, how far the maxim is applicable to this case, "that the domicile of the wife follows that of the husband." Can this maxim be true in its application to this subject, where the wife claims to act, and, by law, to a certain extent and in certain cases, is allowed to act, adversely to her husband? It would oust the court of its jurisdiction in all cases where the husband should change his domicile to another state before the suit is instituted.

It is in the power of a husband to change and fix his domicile at his will. If the maxim could apply, a man might go from this county to Providence, take a house, live in open adultery, abandoning his wife altogether, and yet she could not libel for a divorce in this state, where, till such change of domicile, they had always lived. He clearly lives in Rhode Island; her domicile, according to the maxim, follows his; she therefore, in contemplation of law, is domiciled there too, so that neither of the parties can be said to live in this commonwealth.

It is probably a juster view to consider that the maxim is founded upon the theoretic identity of person and of interest between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists where union and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be

dissolved, or so modified as to establish separate interests, and especially a separate domicile and home, bed and board being put, apart for the whole, as expressive of the idea of home. Otherwise the parties, in this respect, would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not in that of the wife.

The husband might deprive the wife of the means of enforcing her rights, and in effect of the rights themselves, and of the protection of the laws of the commonwealth, at the same time that his own misconduct gives her a right to be rescued from his power, on account of his own misconduct towards her: *Dean v. Richmond*, 5 Pick. 461; *Barber v. Root*, 10 Mass. 260.

The place where the marriage was had, seems to be of no importance. The law looks at the relation of husband and wife as it subsists, and is regulated by our laws, without considering under what law or in what country the marriage was contracted.

The good sense of the thing seems to be, if the statute will permit us to reach it, that where parties have *bona fide* taken up a domicile in this commonwealth, and have resided under the protection and subject to the control of our laws, and during the continuance of such domicile, one does an act which may entitle the other to a divorce, such divorce shall be granted, and the suit for it entertained, although the fact was done out of the jurisdiction, and whether the act be a crime which would subject a party to punishment or not; that after such right has accrued, it can not be defeated, either by the actual absence of the other party, however long, continued *animo revertendi*, or by a colorable change of domicile; or even by an actual change of domicile; and that it shall not be considered in law, that the change of domicile of the husband draws after it the domicile of the wife to another state, so as to oust the courts of this state of their jurisdiction, and deprive the injured wife of the protection of the laws of this commonwealth, and of her right to a divorce.

But where the parties have *bona fide* renounced their domicile in this state, though married here, and taken up a domicile in another state, and there live as man and wife, and an act is done by one, which, if done in this state, would entitle the other to a divorce, and one of the parties comes into this state, the courts of this commonwealth have not such jurisdiction of the parties, and of their relation as husband and wife, as to warrant them in saying, that the marriage should be dissolved. The case of

Barber v. Root is an authority for saying, that such a divorce would not be valid in New York.

It is of importance that such a question should be regulated, if possible, not by local law or local usage, under which the marriage relation should be deemed subsisting in one state and dissolved in another; but upon some general principle, which can be recognized in all states and countries, so that parties who are deemed husband and wife in one, shall be held so in all.

So many interesting relations, so many collateral and derivative rights of property, and of inheritance, so many correlative duties depend upon the subsistence of this relation, that it is scarcely possible to overrate the importance of placing it upon some general and uniform principle, which shall be recognized and adopted in all civilized states.

It appearing that the alleged desertion would be no ground of divorce, by the laws of the state of New York, that at the time of the alleged desertion, the parties had their home in that state, and were not subject to the law and jurisdiction of this commonwealth, and that when the suit was instituted the respondent still had his domicile in the state of New York, the court are of opinion that a divorce *a mensa* can not be decreed, and that the libel be dismissed. If it be true, as stated by the respondent's counsel, that no evidence was given of the respondent's ability to support his wife, that would seem to be an additional reason why the libel can not be maintained.

DIVORCE PROCURED IN ANOTHER STATE is void in the state where the parties actually reside: *Hanover v. Turner*, 7 Am. Dec. 203, and note.

DIVORCE GRANTED AGAINST ONE RESIDING IN ANOTHER STATE, who was not personally served with process, was held void in *Dorden v. Fitch*, 8 Am. Dec. 225. But in *Tolen v. Tolen*, 21 Id. 742, a divorce granted against a non-resident defendant was upheld, the marriage as well as the cause of divorce having taken place in another state, and the defendant never having been a resident of the state in which the divorce was granted; and it was held that the *lex domicilii* was the rule of decision in divorce suits. See the note to that case for a discussion of the subject as to the power of the courts of one state or country to dissolve a marriage contracted in another. In *Harding v. Alden*, 23 Am. Dec. 549, a divorce granted in Rhode Island, for adultery committed in North Carolina, was held good in Maine, although the defendant had never resided in Rhode Island, the record, however, reciting personal service. It was said, in that case, to be unnecessary that the cause of divorce should have arisen within the jurisdiction of the court pronouncing the divorce. In *Lyon v. Lyon*, 2 Gray, 367, it appeared that a divorce was granted in another state to a wife two months after her removal from Massachusetts, for a cause arising in the latter state, but not being a ground of divorce there, the husband having continued to reside in Massachusetts, and not having been

served with process, and such divorce was declared void on the authority of the principal case. But where both parties were citizens of Massachusetts at the time the cause of divorce arose, but were out of the state at the time, being on their way to one of the territories where they proposed to establish their home, and the wife returned to Massachusetts, but the husband did not, a divorce granted to the wife in Massachusetts was held valid: *Shaw v. Shaw*, 98 Mass. 161, the principal case being cited to the point that the wife's rights were not affected by the husband's subsequent establishment of his domicile outside the state.

HUSBAND AND WIFE MAY HAVE DIFFERENT DOMICILES where the husband has deserted the wife: *Harding v. Alden*, 23 Am. Dec. 549. The wife's domicile generally follows that of the husband: *Hood v. Hood*, 11 Allen, 199; but for the purpose of procuring a divorce, an innocent wife may undoubtedly have a separate domicile from her husband's: *Burlen v. Shannon*, 115 Mass. 448; *Barber v. Barber*, 21 How. U. S. 594; and the husband's removal can not affect her domicile, so as to deprive the court of jurisdiction: *Brett v. Brett*, 5 Metc. 235. In all the cases just referred to, *Harteau v. Harteau* is recognized as an authority on this point. It is cited, also, in *Ross v. Ross*, 103 Mass. 576.

PARISH v. STONE.

[14 PICKERING, 198.]

PROMISSORY NOTE MADE TO EQUALIZE THE DISTRIBUTION OF THE ESTATE of the promisor, without other consideration, is *nudum pactum*, and can not be enforced.

VALID DONATIO MORTIS CAUSA CAN NOT BE MADE OF THE DONOR'S NOTE payable to the donee.

NOTE GIVEN FOR TWO DISTINCT CONSIDERATIONS, ONE VALID and the other not, being partly a compensation for services, and partly a gratuitous gift, must be apportioned as between the original parties and those standing in the same relation, and the holder shall recover so far as it is valid.

JURY MUST DETERMINE WHAT PART OF SUCH NOTE is founded on the valid consideration, if the parts are not respectively liquidated and ascertainable by computation.

APPEAL from a decree of the judge of probate, allowing the appellee's account as executor of Parish's will. The disputed item, which was allowed as a debt due the appellee, was a certain note made by the testator to the appellee, who was his son-in-law, payable one year after the maker's death. The note, it appeared, was made during the testator's last illness, a few days before his death, and was intended partly as a compensation for services rendered by the appellee, and partly to equalize the distribution of the testator's estate under his will. But there was no agreement between the parties, or declaration by the testator, to show what part of the note was intended for either of said purposes, and that question was left to the jury, who found that there were services rendered to the extent of

one hundred and fifteen dollars, which was part of the consideration for said note. Judgment was to be rendered for that sum, or for the whole note, as this court should direct.

Bates, Dewey, and Wells, for the appellants, claimed: 1. That the note was void except for the sum found by the jury: *Fink v. Cox*, 18 Johns. 145 [9 Am. Dec. 191]; 2 Kent Com. 355. 2. That it could not be supported as a *donatio mortis causa*: *Ward v. Turner*, 2 Ves. sen. 431; *Tule v. Hilbert*, 2 Ves. jun. 111.

L. Strong and Forbes, for the appellee, insisted: 1. That the note was valid as a *donatio mortis causa*: *Bowers v. Hurd*, 10 Mass. 427; *Hill v. Buckminster*, 5 Pick. 394; *Amherst Academy v. Cows*, 6 Id. 432 [17 Am. Dec. 387]; *Snellgrove v. Baily*, 3 Atk. 214; 1 Roper on Leg. (1 Am. ed.) 25, 32, 36, 37, 41; Swinb. pt. 1, sec. 7; Toller (4 ed.), 233; Bac. Abr., tit. Legacies, A; Com. Dig., Chancery, 3 Y, 4; *Lawson v. Lawson*, 1 P. Wms. 441; *Wright v. Wright*, 1 Cow. 598. 2. That the jury having found that there was a consideration, and no attempt having been made to show failure of consideration, fraud, or mistake, there could be no reduction of damages: *Amherst Academy v. Cows*, 6 Pick. 432 [17 Am. Dec. 387]; 2 Stark. Ev. (Metc. ed.) 280, 282; *Pillans v. Mierop*, 3 Burr. 1670; *Sharrington v. Strotton*, Plowd. 308; 1 Fonbl. 329; *Rann v. Hughes*, 7 T. R. 350, note; Chit. Con. 276; 1 Dane Abr. 89, 109; *Farnsworth v. Garrard*, 1 Camp. 38 and note; *Tye v. Gwynne*, 2 Id. 346; *Moggridge v. Jones*, 3 Id. 38; *Greenleaf v. Cook*, 2 Wheat. 13; *Howard v. Wilham*, 2 Greenl. 393; *Barber v. Backhouse*, Peake, 61; *Lewis v. Cosgrave*, 2 Taunt. 2; *Pikard v. Cottels*, Yelv. 56; *Bliss v. Negus*, 8 Mass. 51.

By Court, SHAW, C. J. This case has been argued for the executor upon three grounds:

1. Supposing the whole note was intended to equalize the distribution of the testator's property, it may be supported as a contract.

2. It may be supported as a good *donatio causa mortis*.

3. Or if it can not be supported upon either of these grounds, as there was in fact a valuable consideration in services, and the promise was entire, and no fraud proved, it is immaterial whether the consideration was adequate or not; any valuable consideration is sufficient to support a promise in a suit between the original parties, and therefore the damages ought not to be apportioned, and the appellee is entitled to recover the whole.

1. As a contract, it appears to us quite impossible that the promisee could support an action, or sustain a legal claim.

It is now well settled that to support a promise or other contract, not under seal, as a contract binding in law, there must be a legal consideration; and in the application of this rule, it is quite immaterial whether the contract be by parol or in writing. The law, however, attributes so much force and effect to the formal written contract, and to the words "value received," as to presume, in the absence of proof, that there was a valuable consideration for the promise; and if the promisor would avail himself of the defense, that it was without consideration, it lays the burden of proof upon him satisfactorily to show that. But when the facts are disclosed, the burden of proof comes to be of little importance. It has therefore been the established rule of law, that in a suit upon a promissory note, against the promisor, by the promisee, or by an indorsee, without value given, or taking the note under such circumstances as to enable him to stand only upon the rights of the promisee, it is competent for the promisor to show, by way of defense, that the promise was gratuitous, and made without any legal consideration: *Bliss v. Negus*, 8 Mass. 46; *Hill v. Buckminster*, 5 Pick. 393.

A contrary doctrine was laid down in *Bowers v. Hurd*, 10 Mass. 427; but it has frequently been stated, and by the judges who decided it, that, although the decision of that case might well be supported, yet that the position there laid down, that a written contract could be supported without a legal consideration, could not be maintained. It was so intimated in *Mills v. Wyman*, 3 Pick. 208, but more distinctly in *Hill v. Buckminster*, already cited, in which the same eminent judge, who gave the opinion in that case, says: "In coming to this conclusion we undoubtedly overrule some of the expressions in the opinion as reported in the case of *Bowers v. Hurd*." The court then distinctly lay down the principle that, notwithstanding the formality of a note or written promise, and the deliberation with which it may be presumed to have been made, still, if it appear to have been made gratuitously, and without a legal consideration, though it may be binding *in foro conscientiæ*, it will not support an action; and further, that the common admission of "value received," is not conclusive, but may be inquired into, and contradicted by evidence.

Such being the clear rule of law, it follows that a contract to pay money, founded upon no other consideration than that of equalizing the distribution of one's estate, after his decease, is

merely gratuitous; it is *nudum pactum*, given upon no sufficient legal consideration, and therefore can not support an action or found a legal claim.

The rule being clear and well settled by authorities, it is not necessary to support it by a reference to the principle upon which it is founded. But as it appears sometimes to operate harshly, and to defeat the intentions of those who have a right to dispose of property as they please, it may afford some satisfaction to consider the importance of making and preserving a broad distinction between the claims of legatees and others, who rest their claims upon the bounty of the testator, and creditors who have demands upon his justice, which are in their nature paramount. The law, in a variety of ways, and upon the most satisfactory grounds, secures to creditors a preference. Indeed, a holder of property, dying, can hardly be said to be the owner, beyond the balance which will remain after satisfying the demands of creditors. But if the holder of a gratuitous note can set it up as a legal claim, it would be extremely difficult to apply the rules of the law to his case, which are made for the purpose of preserving the distinction between volunteers and creditors. He would claim as a creditor upon his contract; and if such a promise is allowed to have the character and effect of a contract, it is difficult to perceive upon what ground such a promisee could be prevented from recovering, either at law or before commissioners of insolvency, and coming in upon an equal footing with other creditors. And as to the circumstance that in a particular case the intent of the owner of property may be defeated, it seems to be a perfect answer, that an owner of property has only to put his intent in the form of a bequest, and it will be carried into effect, as far as it can be consistently with the paramount claims of creditors and others, founding their claims upon legal contracts. To permit a bequest or voluntary gift to be made in the form of a binding and obligatory contract, conferring, as they do, very different rights, and calling for different remedies, will seldom be resorted to for any useful or proper purpose, and would tend to a confusion and uncertainty of rights extremely inconvenient in practice. And the adaptation of a general rule to practical utility and certainty affords a very strong reason for adopting and adhering to it.

2. The next question is, whether the note in controversy can be deemed good as a *donatio causa mortis*.

It is not necessary to go at large into the consideration of

this species of title to property. It is now well settled that under certain limitations a gift may be made by one in present contemplation of death, of money or other property capable of passing by delivery; that to give effect to such a donation, there must be a clear and manifest intention of the owner to give a subject capable of passing by delivery, and an actual delivery at the time in contemplation of death; that such a gift is inchoate, and does not become perfect till the death of the donor; that it is revocable by the donor during his life, and if he recovers from the sickness or other cause of apprehended death, under which the donation is made, the gift is void. But where there is such a gift and actual delivery, and the expected death of the donor ensues, the gift is complete, and vests the property in the donee presently, without its vesting in or passing through the executor or administrator, and it is liable to be divested only in favor of the creditors of the donor: 2 Kent Com. (1st ed.), 358.

In the present case there is no doubt of the actual intention of the donor to make the gift in contemplation of death, and of the actual delivery of the promissory note to the donee, and the death of the donor, all of which are essential requisites.

But we think the donor's own promissory note payable to the donee could not be the subject of such a donation. It was not an existing available promissory note to any one; it was not a chose in action. We have already seen that it was not a binding contract by the promisor to the promisee; and if it were, it would be open to another objection as a *donatio causa mortis*, namely, that it would not be revocable by the donor. It was simply a promise to pay money, and as such and as a gift of a sum of money, it wants the essential requisite of an actual delivery. In the case of *Bowers v. Hurd*, 10 Mass. 429, already cited, the court, speaking of such a note, say: "We can not consider it as a *donatio causa mortis*, as was suggested at the bar, for that must be complete at the time by a delivery of the thing given."

The necessity of an actual delivery has been uniformly insisted upon, in the application of the rules of the English law to this species of gift. It was, in some measure, from the strict application of this rule, and from the impossibility of making an actual delivery of that species of property, that it was long doubted whether choses in action, that is, bonds, notes, and other securities for money, could, in any way, be the subject of such a gift. In the case of *Ward v. Turner*, 2 Ves. sen. 431,

where the whole subject was very fully discussed, and where the doctrine of actual delivery was insisted on as indispensable, it was held by Lord Hardwicke, that a gift of receipts for south sea annuities was not a good *donatio causa mortis*, principally because the property in the stock did not pass by a delivery of the receipts, but a transfer was necessary, which was not made. But it has since been decided, that a delivery of such securities and choses in action, as pass a property to the bearer by delivery, may properly be the subject of this species of gift, where the securities are delivered, as bank notes or specie bills: *Drury v. Smith*, 1 P. Wms. 404; lottery tickets: *Gold v. Rulland*, 1 Eq. Cas. Abr. 346; and exchequer tallies: *Jones v. Selby*, Prec. Chan. 300. And there can be no reasonable doubt that a promissory note payable to bearer, or indorsed in blank, so as to pass by delivery, might also pass by a gift and actual delivery, as a *donatio causa mortis*.

But whatever doubt may have existed, it has been decided that as an assignment of a chose in action is now recognized as a good transfer of the equitable interest, and as such equitable assignment is manifested by a delivery over of the bond or other security for money, by a gift of such a bond, accompanied by an actual delivery of the bond, an equitable interest vests in the donee, and the executors of the donor, in whom the legal interest remains, are mere trustees for the donee, and bound to permit the donee to use their names to enforce the payment of the bond at law: *Snellgrove v. Baily*, 3 Atk. 214; *Gardner v. Parker*, 3 Madd. 184;¹ *Blount v. Burrow*, 4 Bro. C. C. 72. And as a confirmation and necessary consequence of this doctrine, it has also been held that a bond and mortgage may be a good subject of a gift; that an equitable interest in the money, secured by the personal obligation, passes by a gift and delivery over of the security; that the mortgage attends and follows the debt, as an inseparable incident; that although the legal interest in the debt vests in the executor, and that of the mortgaged premises in the heir of the donor, yet in equity they are both to be considered trustees for the donee of the debt or sum of money secured by the mortgage, the executor to permit the donee to sue in his name on the personal security, and the heir to convey the mortgaged premises in security of the debt: *Duffield v. Elwes*, 2 Bligh N. R. 514; S. C., under the name of *Dow v. Hicks*,² 1 Dow & C. 1, in the house of lords. These cases all go on the assumption that a bond,

1. See 3 Madd. 102.

2. *Duffield v. Hicks*.

note, or other security, is a valid, subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money, by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession; all which ingredients are wanting in his own note given by the donor to the donee, without consideration, which is a mere gratuitous promise.

A case has been recently decided in England, which seems to be directly in point. It was assumpsit on a promissory note, payable to a child nine years old, given by a man in advanced age, in an imbecile state, who died a few months after. The action was against the executor of the promisor. It appeared that the maker was intimate with the child's father, and acquainted with the child himself. No consideration was proved. The judge, at *nisi pruis*, had ruled, that "value received" imported a good consideration, and that the burden of proof was upon the party denying it, and that affection for the child, a friendship for the father, or a desire to avoid the legacy duty, would, either of them, be a sufficient consideration in point of law. On motion, this verdict was set aside for misdirection, and the court in giving judgment say, it was for the jury to find whether the note was given upon any legal consideration; and that mere friendship or affection would clearly, according to all the authorities, not establish a sufficient legal consideration. And Chief Justice Abbott added: "I am inclined to think that the desire to avoid the legacy duty would be equally insufficient; because then the note would not be payable till after the donor's death, which here it might have been, and a promissory note is not good as a *donatio causa mortis*: *Holliday v. Atkinson*, 8 Dow. & Ry. 163; S. C., 5 Barn. & Cress. 501. In that case, it having been argued that the note was intended as a gift, and there being no evidence to disprove that view of the case, if the note could have been supported upon that ground, there was no sufficient reason for setting aside the verdict."

We are aware that there is one case having an opposite bearing, that of *Wright v. Wright*, 1 Cowen, 598. That case came before the court, on motion, after verdict for the plaintiff, and under most unfavorable circumstances for the defendants, and the court refused to set aside the verdict. The case is very short, and no authorities are cited, and it seems to have been decided upon the ground that a chose in action, a valid subsisting obligation for the payment of a sum of money, may be the subject of a good *donatio causa mortis*, without distinguish-

ing between the donor's own note, payable to the donee, being a mere promise to pay a sum of money, and a note or other security for the payment of money, held by the donor against a third person. With the most entire respect, therefore, for the learned judges who decided that case, we think it opposed to the current of authorities.

3. But another question arises upon this case, which it becomes necessary to consider, and this is, whether, as there was a legal and valuable consideration to some extent, in services performed at the testator's request, and the promise was entire, the note may not be supported upon that ground.

It was argued for the plaintiff, that as between original parties, and where the adverse rights of creditors are not in question, the law will not inquire into the adequacy or sufficiency of the consideration, that being left to be adjusted by the parties themselves, and that any legal consideration of benefit to the promisor, or loss or forbearance on the part of the promisee, will be sufficient to give legal effect to the promise, and to maintain an action. This principle is undoubtedly correct, and supported by the authorities.

But the difficulty in applying that rule to the present case, is that, in point of fact, the services were not the consideration; that is, the moving cause, the determining motive to the testator's promise. If the testator, considering the value and importance of the services, either before or after they were performed, and intending to make a liberal compensation therefor, had promised to give the sum of six hundred dollars therefor, it would be extremely difficult to contend upon the inadequacy of the consideration, that the plaintiff should not recover the full sum. If there were any doubt as to that fact, it should be left to the jury to find whether in truth it was the intention of the testator to give the note as a compensation for the services. But we are now to take it that the question has been so left, and the jury have found that as to part of the note, the consideration was services, and as to the balance, it was intended as a mortuary gift by the testator, to render the distribution of his estate more equal and just, as he believed, than it would be left by his will, then executed. It being thus left, and the jury having thus found, it is impossible, as suggested in the argument, to reject this part of the verdict as immaterial.

Had the note been taken for two distinct liquidated sums, consolidated, and the consideration had been wholly wanting, or wholly failed as to one, it seems quite clear that, according

to well-established principles, supported by authorities, the note, as between the original parties, and all those who stand in such relation, as to allow the defense of want of consideration, it would be competent for the court to apportion the note, and consider it good in part, and void in part, and to permit the holder to recover accordingly.

In Bayley on Bills (Phillips and Sewell's ed.), 340, and in most other text-books, it is laid down that want or failure of consideration is a good defense as between immediate parties or holders without value, either total or *pro tanto*, as the failure goes to the whole or part of the consideration: *Barber v. Backhouse*, Peake's Rep. 61. Where there was originally no consideration for part of the sum expressed in the bill, the jury may apportion the damages: Per Lord Kenyon, *Darnell v. Williams*, 2 Stark. 166.

That the holder in such case recovers on the note, and not on the original consideration, is rendered manifest by another series of decisions, thereby showing that the note is good *pro tanto* as a negotiable instrument, upon which a holder by indorsement may sue and recover, whereas the right to recover upon the original consideration would not be negotiable, and would not vest in the holder of the note by indorsement.

It being held that when a bill or note is made without value, or as an accommodation note, this may be shown as a good defense against the payee; it is also held, as a principle absolutely essential to the currency of bills and notes, that where an indorsee takes a bill for valuable consideration, or derives title through any one who has paid value for it, he shall recover to the amount, notwithstanding it was originally made without value, and as an accommodation bill. It follows as a necessary consequence from these two principles, that where an indorsee of an accommodation bill has taken it for value, but for less than the amount expressed by the bill, there the holder shall recover only to the amount for which he has given value: *Jones v. Hibbert*, 2 Stark. 304. In that case, the defendant accepted a bill for four hundred and fifteen pounds, to accommodate Phillips & Co., who indorsed it to their bankers for value, and became bankrupt; the bankers knew it to be an accommodation acceptance, and their demand against Phillips & Co. was two hundred and sixty-five pounds only; it was held that they could only recover the two hundred and sixty-five pounds, and they had a verdict accordingly.

So where a bill accepted as a gift to the payee is indorsed for

a small consideration, the indorser can recover only to that extent: *Nash v. Brown*, Chitty on Bills (5 ed.), 93.

From these cases it is manifest that the plaintiff recovers on the bill, and not on the original consideration; otherwise the right to sue and recover *pro tanto* would not pass to the indorsee by the negotiation of the bill. They therefore establish the proposition, that where the parts of a bill are divisible, making an aggregate sum, and as to one liquidated and definite part, there was a valuable consideration, and as to the other part, there was no consideration; the bill, as such, may be apportioned, and the holder may recover for such part as was found on a good consideration.

But it is contended that where the parts of the bill are not liquidated and distinguishable by computation, a different rule prevails, and several English cases are relied on to show that though the consideration fails in part, the whole bill is recoverable: *Moggridge v. Jones*, 14 East, 486; *Morgan v. Richardson*, 1 Camp. 40, note; *Tye v. Gwynne*, 2 Id. 346; *Grant v. Welchman*, 16 East, 206. In these cases it was held that where the note was given for an entire thing, and the consideration afterwards failed in part, the whole bill was recoverable, and the defendant was left to his cross-action. As where the note was given for a lease, and the lease was not completed according to contract; or for a parcel of hams, and they proved bad and unmarketable; or for goods, and they were of a bad quality and improperly packed; or for an apprentice fee, and the apprentice was not kept by his master.

In this respect there seems to be some distinction between the English decisions and those of New York. In the latter it was held that upon a suit between original parties, upon a note given upon a contract to manufacture casks, the defendant might go into evidence to show that the casks were unskillfully manufactured, to reduce the amount of damages.

But without relying upon this difference, we think the English decisions may be well reconciled by a reference to the known distinction between failure of consideration and want of consideration.

All the cases put are those of failure of consideration, where the consideration was single and entire, and went to the whole note, and was good and sufficient at the time the note was given, but by some breach of contract, mistake, or accident, had afterwards failed. There the rule is, if the consideration has wholly failed, or the contract been wholly rescinded, it

shall be a good defense to the note. But if it have partially failed only, it would tend to an inconvenient mode of trial and to a confusion of rights, to try such question in a suit on the note as a partial defense, and therefore the party complaining shall be left to his cross action. This distinction, and the consequence to be drawn from it, is alluded to by Lord Ellenborough in *Tye v. Gwynne*, 2 Camp. 346. He says: "There is a difference between want of consideration and failure of consideration. The former may be given in evidence to reduce the damages; the latter can not, but furnishes a distinct and independent cause of action." It seems therefore very clear, that want of consideration, either total or partial, may always be shown by way of defense; and that it will bar the action, or reduce the damages from the amount expressed in the bill, as it is found to be total or partial respectively. It can not, therefore, in such case depend upon the state of the evidence, whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended to be in a great degree gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt and what a gratuity. The rule to be deduced from the cases seems to be this, that where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made; but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not; there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. In the application of this principle, there seems to be no reason why it shall depend upon the state of the evidence, showing that these different parts can be ascertained by computation; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration, and what upon the other, like every other questionable fact, should be settled by the jury upon the evidence. This can never operate hardly upon the holder of the note, as the presumption of law is in his favor as to the whole note; and the burden is upon the defendant to show to what extent the note is without consideration.

Suppose a father proposes, upon his son's going into business, to aid him by an advance of several thousand dollars, and for

that purpose gratuitously offers him his note for that sum, but as his son had performed services to the value of a few dollars, for which no price was agreed, upon giving his note, the father, intending to cancel and discharge that and all other claims, takes a general receipt for all services and other dues, and afterwards, the note not having been negotiated, a suit should be brought on it by the payee against the maker, might not the defendant show the want of consideration by way of defense *pro tanto?* and yet the amount must be settled by a jury, the evidence of the original agreement not distinguishing between what was payment and what was gratuity.

On the whole, we are all of opinion that it was rightly left to the jury to find what part of this note was given in compensation for services, the evidence showing that all beyond that was gratuitous. To the extent of the consideration of the note for services as found by the jury, judgment is to be entered on the verdict.

NOTE MADE TO EQUALIZE THE DISTRIBUTION of the promisor's estate, and without other consideration, is void, both as a contract and as a *donatio mortis causa*: *Fink v. Cox*, 9 Am. Dec. 191; *Priester v. Priester*, 23 Id. 91.

DONOR'S NOTE CAN NOT BE A DONATIO MORTIS CAUSA, but it is otherwise, as to notes of third persons, payable to the donor or order. See the note to *Bradley v. Hunt*, 23 Am. Dec. 600, 606. The principal case is cited in *Wilbar v. Smith*, 5 Allen, 197, to the point that a valid *donatio mortis causa* can not be made of the donor's note, but it is said that such a note, if referred to in a will, and made a part of it, may be valid as a specific legacy. In *Carr v. Silloway*, 111 Mass. 26, it appeared that a father made two notes, payable to his son, on demand, for nearly the whole of his estate, and took eleven notes of his son, payable to himself or order, three months after date. These latter notes he indorsed with the names of certain relatives, and delivered them to his daughter in a sealed package, with instructions to her to open the package a year after his death, if he should not reclaim it. He died without reclaiming the package, and a year afterwards the daughter broke the seal, according to instructions, and distributed the notes to the persons whose names were indorsed thereon. On a bill filed by the administrator of the deceased, it was held, that the two notes given to the son were without consideration, and void; that the instructions to the daughter could not be enforced as a declaration of trust; that the indorsement and delivery of the notes to her, did not constitute a valid gift *inter vivos*, or *mortis causa*, and that the holders of all the notes would be restrained from enforcing them. The principal case is referred to as an authority on the subject of gifts *mortis causa* in the course of the opinion. It is cited also in *Sessions v. Moseley*, 4 Cush. 92, and also in *Chase v. Redding*, 13 Gray, 420, to the point that a note of a third person, whether negotiable or not, may be made the subject of a *donatio mortis causa*, by delivery only. So it is cited in *Coleman v. Parker*, 114 Mass. 32, and *McGrath v. Reynolds*, 116 Id. 568, to the point that actual and effective delivery is necessary to constitute a gift *mortis causa*. So, in *Lewis v. Bolitho*, 6

Gray, 138, to the point that a *donatio mortis causa* may be valid between the parties thereto, though creditors may dispute it.

THAT A NOTE FOUNDED ON TWO DISTINCT CONSIDERATIONS, one valid and the other not, though the amount dependent upon each respectively is unliquidated, should be apportioned and held valid to the extent of the good consideration, is a position, for which *Parish v. Stone* is recognized as authority in a number of cases: *Harrington v. Stratton*, 22 Pick. 517; *Bond v. Fitzpatrick*, 4 Gray, 93; *Eastern R. R. Co. v. Benedict*, 15 Id. 293; *Hubbard v. Chapin*, 2 Allen, 330; *Guill v. Belcher*, 119 Mass. 258. So in *Howard v. Ames*, 3 Metc. 310, and *Hodgkins v. Moulton*, 100 Mass. 311, a partial failure of consideration is held, on the authority of the principal case, to be a good defense *pro tanto*. In *Miner v. Bradley*, 22 Pick. 460, it was held that the doctrine of the principal case, as to apportioning the consideration of a contract, did not apply to a case where a vendee of chattels paid a gross sum therefor, and the vendor having delivered part, refused to deliver the residue, so as to enable the vendee to retain the part delivered, and recover, for the residue, a proportionate part of the purchase money.

OTHER POINTS TO WHICH THE FOREGOING DECISION is cited as authority are: That a note without consideration is void: *Dyer v. Homer*, 22 Pick. 257; that want of consideration is a good defense: *Corlies v. Howe*, 11 Gray, 127; and that where a want of consideration is relied on as a defense, and there is evidence on both sides of that question, the plaintiff must satisfy the jury on the whole evidence, that there is a sufficient consideration for the contract. The case is cited also in *Bank v. Chapin*, 8 Metc. 44; *Earle v. Reed*, 10 Id. 390; *Hill v. Revcoe*, 11 Id. 272; *Underwood v. Simonds*, 12 Id. 278.

NOTE WITHOUT CONSIDERATION is void. See *Dickinson v. Hall*, *post*, and citations in note thereto.

DICKINSON v. HALL.

[14 PICKERING, 217.]

NOTE GIVEN FOR A VOID PATENT RIGHT is without consideration and void.

COVENANT BY THE VENDOR THAT HE HAS A GOOD RIGHT TO SELL and convey such patent right, and will warrant the same, furnishes no valid consideration for such a note.

VENDOR'S BELIEF THAT SUCH RIGHT IS VALUABLE, will not support an action on such note.

INVENTION, TO BE THE SUBJECT OF A PATENT, MUST BE USEFUL for some beneficial purpose.

ASSUMPSIT on a promissory note. The defendant resisted the action, on the ground that the note was without consideration, being given for the right to use, make, and vend a certain patent machine for breaking and dressing hemp. A conveyance of such patent right from the plaintiff to the defendant, was produced in evidence, containing a covenant that the plaintiff had "good right and lawful authority to bargain, sell, and convey" the said right, and that he would "warrant and defend the same against all and every person or persons lawfully claiming the

same." The plaintiff insisted, that even if the patent was void, this covenant was a sufficient consideration for the note; that if the plaintiff purchased and sold the right without any knowledge of its worthlessness, but believing it to be valid, its invalidity was no defense to this action; and, as to the question of utility, that the jury should not find for the defendant if the machine would accomplish the design of the patent in dressing hemp under some circumstances in which the ordinary method would not answer, even though it should appear that the construction and use of such a machine would not yield any pecuniary profit. On this latter point the defendant prayed an instruction, that if the pretended invention was not capable of beneficial use, and if it must be an unprofitable investment to erect such a machine, the patent was void, and the defendant should have a verdict. The chief justice instructed the jury that if the patent was void, the note was without consideration; that the covenant, in the conveyance, did not constitute a consideration; that if the patent was void from the beginning, it was wholly immaterial whether the plaintiff knew or believed it to be so or not; and that to render the patent valid, the invention must be new and useful; that the general meaning of the term "useful" was "capable of any beneficial use," as distinguished from "pernicious" or "injurious," though the meaning might be more restricted as to patents; that if the invention was utterly frivolous or worthless, it was not "useful;" but if the machine could, under any circumstances, be applied to any beneficial purpose, it might be deemed a useful invention. Verdict for the defendant. The jury, by consent of parties, being asked on what point they found, answered that they considered that the invention was not profitable, and therefore not useful. Motion for a new trial, on the ground of misdirection.

Dewey, for the plaintiff, cited *Fowler v. Shearer*, 7 Mass. 19; *Phelps v. Decker*, 10 Id. 279; *Moggridge v. Jones*, 14 East, 486; *Lloyd v. Jewell*, 1 Greenl. 352 [10 Am. Dec. 73]; *Barnum v. Barnum*, 8 Conn. 469; *Welsh v. Carter*, 1 Wend. 185 [19 Am. Dec. 473]; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 12; *Lowell v. Lewis*, 1 Mason, 182; *Langdon v. De Groot*, 1 Paine, 203.

Alvord, for the defendant, cited *Knapp v. Lee*, 3 Pick. 457; *Frisbee v. Hoffnagle*, 11 Johns. 50; *Weaver v. Bentley*, 1 Cai. 47; *McAllister v. Read*, 4 Wend. 483; *Steinhauer v. Wilman*, 1 Serg. & R. 447; *Tillotson v. Grapes*, 4 N. H. 448; *Gray v. Handkison*, 1 Bay, 278; *Bell v. Huggins*, Id. 327; *Chandler v. Marsh*, 3 Vt.

162; *Greenleaf v. Cook*, 2 Wheat. 13; *Frost v. Raymond*, 2 Cai. 197 [2 Am. Dec. 228]; Com. Dig., Covenant, A, 4; *Merrill v. Frame*, 4 Taunt. 329; *Bliss v. Negus*, 8 Mass. 46; *Lowell v. Lewis*, 1 Mason, 182; *Bedford v. Hunt*, Id. 302; *Earle v. Sawyer*, 4 Id. 6; *Langdon v. De Groot*, 1 Paine, 203; Davies on Patents, 279.

The COURT were of opinion that the patent right being void, there was a total want of consideration for the defendant's promissory note, unless the plaintiff's alleged covenant of title in the patent right constituted a consideration; that such a covenant would not constitute a valid consideration, for the object of the defendant in making this contract was to obtain not a mere covenant, but the conveyance of a patent right; that although the plaintiff might have purchased and sold the supposed patent right, thinking it to be valuable property, still he could not recover in this action, for the defense did not rest on the ground of fraud, but on the ground that the defendant had received no value, and his promise was *nudum pactum*; that an invention, in order to be the subject of a patent, must be useful for some beneficial purpose, and the verdict turned on that question; that the instructions to the jury on this point were correct and sufficiently favorable to the plaintiff; and that the finding of the jury that the invention was not profitable, and therefore not useful, must be taken in connection with the points made by the counsel at the trial, and the instructions of the judge, and without doing violence to the language of the jury, they might well be considered as using the term profitable, not in reference to pecuniary profit merely, but in a broader sense, meaning that no person could make use of the machine in question advantageously.

Judgment according to verdict.

CONTRACT TO PURCHASE AN INVALID PATENT RIGHT, it is held, in *Bellas v. Hays*, 9 Am. Dec. 385, is not enforceable, but it is there said also that this is an equitable defense, and must be distinctly pleaded. A note given for a worthless patent right, accompanied by samples of the article of no separate value, is without consideration: *Bierce v. Stocking*, 11 Gray, 178, citing *Dickinson v. Hall*. So, though the parties acted in good faith, both believing the patent to be valuable: *Lester v. Palmer*, 4 Allen, 146. But a valid patent right is a good consideration for a note, without regard to its pecuniary value or the degree of its utility: *Nash v. Lull*, 102 Mass. 63.

FAILURE OR WANT OF CONSIDERATION OF NOTE AS DEFENSE.—This subject is discussed in the note to *Le Blanc v. Sanglair*, 13 Am. Dec. 378. That a failure of consideration of a note, if total, is a good defense at law, is held in *Barkhamsted v. Case*, Id. 92. But a partial failure of consideration is said to be no defense at law, the relief being in equity: *Wood v. Waters*, Id. 228.

The fact that the article for which a note has been given has turned out to be worthless, is held to be no defense to the note, if there has been no fraud, failure of title, or express warranty, in *Reed v. Prentiss*, 8 Id. 50; *Welsh v. Carter*, 19 Id. 473. A failure of consideration resulting from the obligor's own act, is no defense to a note: *Mitcherson v. Dozier*, 22 Id. 116. Fraud in the sale of a chattel does not bar a recovery on a note for the price, unless the vendee returns the article on discovering the fraud, or shows it to be entirely worthless: *Burton v. Stewart*, 20 Id. 692. In *Lloyd v. Jewell*, 10 Id. 73, it is held that a want or failure of title to land is no defense to a note for the purchase money where the vendor has conveyed with covenants of seisin and warranty. In *Trask v. Vinson*, 20 Pick. 110, and *Bayford v. Pearson*, 9 Allen, 389, the principal case is recognized as authorizing the doctrine that where the consideration of a note is a conveyance of property, and the title fails, the notice is *nudum pactum*, and can not be enforced. But it is said in one of these cases, *Trask v. Vinson*, that an executory agreement to convey land to which the vendor has at the time no title, is a sufficient consideration to support a note. In that case Morton, J., says: "The defendant's counsel argues, that if the contractor fails to convey according to the terms of his agreement, this will be a failure of the consideration of the notes. In support of the argument, he relies upon the cases of *Dickinson v. Hall*, 14 Pick. 217, and *Rice v. Goddard*, Id. 293. There it was holden, that where the consideration of a note was the conveyance of property, real or personal, and the title failed, so that nothing passed by the conveyance, the note was *nudum pactum*. Those cases were well considered, and are founded on sound principles, and supported by an irresistible current of authorities. With the exception of a few *obiter dicta* in our own reports, and the case of *Lloyd v. Jewell*, in Maine, 1 Greenl. 352 [10 Am. Dec. 73], scarcely a *dictum* to the contrary can be found, while there is a remarkable coincidence in all the other American and English decisions upon the subject. But those cases are unlike the present. There the real consideration, the moving cause of the promise to pay, was the estate actually conveyed; here it is an agreement to convey at a future time, and upon the happening of a future event. That was an executed, this an executory contract."

In *Harrington v. Stratton*, 22 Pick. 513, *Dickinson v. Hall* is referred to as authority for the general principle that a total failure of the consideration of a note may be given in evidence in defense of an action thereon. The case is cited also in *Rice v. Stoddard*, 14 Pick. 296, in support of the same principle. See *Parish v. Stone*, ante, 378.

CARY v. BANCROFT.

[14 PICKERING, 315.]

AGREEMENT AT THE MAKING OF A NOTE, that it shall be set off against a note due the maker from the payee (which is not present), so far as the smaller will pay the larger, is executory, and does not, *pro tanto*, extinguish either note.

ASSIGNEE OF AN ACCOUNT TAKES IT SUBJECT TO THE DEBTOR'S RIGHT to set off a subsisting note held by him against the assignor.

PLEA OF TENDER MUST SHOW AN UNQUALIFIED OFFER to pay the whole amount, and such plea admits the amount due and a readiness at all times to pay it.

TENDER OF A NOTE DUE THE DEFENDANT FROM THE ASSIGNOR of the plaintiff, and the balance in money, does not support a plea of tender.

ASSUMPSIT on an account brought in the common pleas. Pleas, the general issue, and a tender. It appeared that Cary, the nominal plaintiff, in January, 1832, assigned said account, for value, to one Stockwell, for whose benefit the action was prosecuted. An account of the defendant against Cary for money had and received, etc., was filed in set-off, and, as evidence to support the same, a note from Cary, payable to the defendant or order, on demand, for twenty-five dollars and fifty-four cents, dated March 19, 1831. A tender was proved to have been made to Stockwell, before this action was commenced, of the said note of Cary and a certain sum in money in full of the account, the amount not being stated or examined by Stockwell, the defendant saying that if it was not enough he would produce enough. Evidence was produced by the plaintiff to show that, on December 5, 1831, the defendant executed to Cary a note on demand for thirty-four dollars and eight cents, which it was then agreed should be set off against Cary's note to the defendant, so far as the smaller would go, the latter note not being present. For the defendant it was proved that Cary, in January, 1832, indorsed to one Goddard his note against the defendant, and that the defendant before the above-mentioned tender paid the amount to Goddard, without notice of the assignment to Stockwell. The jury being instructed that the tender was good, and that the account filed in set-off should be allowed, returned a verdict for the defendant. The plaintiff excepted to the instructions.

Newton and Lincoln, for the plaintiff, as to the tender, cited 5 Dane Abr. 486; *Brady v. Jones*, 2 Dow. & Ry. 305; *Alexander v. Brown*, 1 Car. & P. 288; *Roscoe Ev.* 262; *Strong v. Harvey*, 3 Bing. 304; *Hallowell etc. Bank v. Howard*, 13 Mass. 236.

Davis and Washburn, for the defendant, cited, as to the tender, *Wade's case*, 5 Co. 115; Bull. N. P. 155; 5 Dane Abr. 485; 3 Stark. Ev. 1392; *Douglas v. Patrick*, 3 T. R. 683; *Bred v. Hurd*, 6 Pick. 357; as to the set-off of the notes, *Sargent v. Southgate*, 5 Pick. 312 [16 Am. Dec. 409]; *Green v. Hatch*, 12 Mass. 195; *Field v. Nickerson*, 13 Id. 131; *Jones v. Witter*, Id. 307; *Dix v. Cobb*, 4 Id. 511.

By Court, SHAW, C. J. In the first place, we think it clear that the agreement made between the plaintiff and defendant, at the time that the note for thirty-four dollars and eight

cents was given, that that and the defendant's note for twenty-five dollars and fifty-four cents should balance and be set off, one against the other, so far as the smaller would pay the larger, if available at all, was an executory contract, requiring some further act to be done before the one would operate as payment or extinguishment *pro tanto* of the other. It is like an agreement not to sue, executory and collateral, not affecting the terms of the note till executed: *Dow v. Tuttle*, 4 Mass. 414 [3 Am. Dec. 226]. The note held by Cary against the defendant was then a good subsisting negotiable note, and passed by the indorsement to Goddard, subject, perhaps, to Bancroft's set-off if Goddard received it with actual or constructive notice. But as Bancroft was indebted to Cary on another account, larger than the amount of the note he held against Cary, and had no notice that this account had been assigned to Stockwell, it can not be considered that he paid the note to Goddard in his own wrong.

As the agreement above mentioned did not operate as payment or extinguishment, but left the note of Cary against Bancroft a good subsisting note, capable of passing by indorsement, so Bancroft's note was a good subsisting note, to avail by way of action or set-off, as he might choose to apply it. Stockwell, therefore, took the assignment of Cary's account against Bancroft, subject to the right of the latter to set off this note; to this extent, therefore, it supported the defense.

But upon the other point, the court are of opinion that the plea of tender can not be supported by the evidence. A plea of tender must show an unqualified offer to pay the whole amount, and of course admits the whole to be due. In this respect it differs essentially from the payment of money into court, under a rule, which would have been the proper course in the present case. A plea of tender admits the amount due, and a readiness at all times to pay it. But a set-off, though to a certain extent it admits the plaintiff's claim, yet sets up a counter, independent demand and cause of action, as a legal reason why the defendant should not be held to pay it.

Besides, a man may withdraw his account in set-off before judgment upon it, and bring a separate action upon it; and therefore tender or notice of set-off, did not extinguish the note, and the defendant was not bound by it: *Brady v. Jones*, 2 Dow. & Ry. 305.

Verdict set aside, and new trial granted.

AGREEMENT FOR SETTLEMENT OR SET-OFF, NOT PAYMENT, WHEN.—In *Doody v. Pierce*, 9 Allen, 143, it was held, on the authority of *Cary v. Buncroft*, that an agreement between a mortgagor and mortgagee that the former was to work on the land, and that the wages earned by him should be applied on the mortgage debt, did not operate as payment until the application had been actually made, though he had earned enough to pay the whole debt. So in *Dehon v. Stetson*, 9 Metc. 345, that an agreement between a partnership and one of its debtors, that a note held by the latter against one of the partners should be set off against the amount due the firm, did not constitute payment until the set-off was actually made, and the note surrendered. So in *Gray v. White*, 108 Mass. 229, that an agreement to pay for goods, by surrendering a note held by the purchaser against the vendor, did not operate as payment until the note was given up. The case is cited also in *Davis v. Thompson*, 118 Mass. 499.

TENDER OF MONEY IN BAGS is sufficient, if the party offers to pay the amount required: *Behaly v. Hatch*, 12 Am. Dec. 570. See the note to that case as to what is necessary generally to make a valid tender of money.

PIERCE v. BENJAMIN.

[14 PICKERING, 356.]

PURCHASE BY A TAX COLLECTOR AT HIS OWN SALE is not absolutely void, but voidable, at the option of the owner of the property.

OWNER'S RIGHT TO MAINTAIN TROVER FOR GOODS SO SOLD is doubtful where he has not previously elected to annul the sale by a demand of the property or otherwise.

COLLECTOR SELLING PROPERTY FOR TAXES, AFTER THE EXPIRATION OF THE TIME prescribed by statute therefor, becomes a trespasser *ab initio*, though the original taking was rightful.

OWNER MAY SUE IN TROVER WITHOUT A DEMAND AND REFUSAL in such a case, the taking constituting a conversion.

TROVER LIES WHEREVER TRESPASS DE BONIS ASPORTATIS will lie.

OWNER DOES NOT WAIVE HIS RIGHT OF ACTION against a tax collector for an illegal seizure and sale of his property by paying the balance of the tax, and taking a receipt for the whole.

MEASURE OF DAMAGES in such a case is the value of the property less the amount applied to the owner's tax.

TROVER for a sleigh. Plea, the general issue. Verdict for the plaintiff, assessing damages at the full value of the property, under the direction of the judge, reserving the question as to the proper measure of damages for the whole court, such verdict to be amended or set aside, or judgment thereon, as the court should determine. The case appears from the opinion.

Newton and Smith, for the defendant, claimed: 1. That the action would not lie without proof of a demand and refusal before it was commenced, the sale not constituting a conversion if the taking was lawful: *Storm v. Livingston*, 6 Johns. 44;

Ford v. Phillips, 1 Pick. 202; *Badger v. Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; *Cheetham v. Lewis*, 3 Johns. 42; *Jennison v. Hapgood*, 7 Pick. 8 [19 Am. Dec. 258]; *Jackson v. Walsh*, 14 Johns. 407. 2. That the plaintiff had misconceived his action, because after the sale he had neither a general nor special property, which was necessary to maintain trover: *Livermore v. Bagley*, 3 Mass. 487; *Waterman v. Robinson*, 5 Id. 303; *Ludden v. Leavitt*, 9 Id. 104 [6 Am. Dec. 45]; *Warren v. Leland*, Id. 265; *Commonwealth v. Morse*, 14 Id. 217; *Jennison v. Hapgood*, 7 Pick. 8 [19 Am. Dec. 258]; *Jackson v. Walsh*, 14 Johns. 107. 3. That this sale, if voidable, was affirmed by bringing this action: *Sheldon v. Sheldon*, 13 Id. 220. 4. That the delay in selling gave the plaintiff no cause to complain, as he had a longer time to pay the tax: *Haynes v. Wallis*, 6 Pick. 462. 5. That the defendant was at least entitled to a deduction for what was paid on the tax: *Sheldon v. Sheldon*, 13 Johns. 220; *Prescott v. Wright*, 6 Mass. 20; *Sandford v. Nichols*, 13 Id. 286 [7 Am. Dec. 151]; *Caldwell v. Eaton*, 5 Id. 404.

Merrick and Sibley, for the plaintiff, insisted: 1. That the delay in selling made the defendant a trespasser *ab initio*: *Purington v. Loring*, 7 Mass. 388; *Nelson v. Merriam*, 4 Pick. 249. 2. That the taking thus became tortious, and either trespass or trover would lie: 1 Chit. Pl. 153; *Farrington v. Payne*, 15 Johns. 431; *Prescott v. Wright*, 6 Mass. 20; *Wallis v. Truesdell*, 6 Pick. 455; 2 Selw. N. P. 1071.

By Court, MORRIS, J. The defendant, who was collector of taxes in the town of Montague, justifies the taking of the goods in question under a warrant from the assessors of that town, and a seizure and sale of the same for the payment of the plaintiff's taxes.

It appears, from the reported facts in the case, that the defendant was the highest bidder and purchaser at his own auction. This conduct of the defendant was clearly a violation of his official duty. Such a practice must, if it did not in the present instance, lead to fraud in the publication of notices and the selection of places of sale. The respective duties of buyer and seller are incompatible with each other, and no person, in whatever capacity he may undertake to act, can rightfully sustain both characters. But a sale by an officer or other trustee to himself is not absolutely void. The *cestui que trust* has an option to affirm or avoid it, as he may judge most advantageous to himself. As the plaintiff had made no election

to annul the sale by a demand of the property, or otherwise, before the commencement of the action, it may well be doubted whether, upon this ground, he could recover.

But it further appears, that more than six days elapsed after the seizure of the distress, and before the sale. This, in our opinion, is fatal to the defendant's justification.

The stat. 1785, c. 70, sec. 2, regulates the proceedings of collectors and constables on warrants for the collection of taxes. These proceedings are modified, in a way not affecting the present case, by the stat. 1791, c. 22, sec. 2. The former statute requires the collector or constable, distraining for non-payment of taxes, to keep the distress four days, and if the taxes be not then paid, to advertise forty-eight hours, and then, viz., at the end of six days, to sell at public auction. The latter statute authorizes the forty-eight hours' notice to be given within, and the sale to be made at the expiration of the four days. It is immaterial to the present inquiry, whether the latter statute is imperative, or only gives the officer a discretion to advertise within or at the end of the four days, as he may judge expedient: *Lane v. Jackson*, 5 Mass. 157; *Caldwell v. Eaton*, Id. 399. The officer did not offer the distress for sale within six days, and therefore can not protect himself under either of these statutes. Having no legal justification for the forcible seizure of the plaintiff's property, he stands in the same relation to him as if he had originally taken it without any authority; and must be deemed a trespasser *ab initio*.

It is important to the rights of property, that positive regulations authorizing the seizure and sale of chattels without the consent of the owner, should be lawfully and strictly complied with. The defendant has failed to do this. Although the original purpose of the taking was proper, and the taking itself rightful, yet when there was a failure to make a lawful application, the whole became unjustifiable from the beginning. Having used the goods unlawfully, or applied them to an improper purpose, the officer can not be permitted to show that they were taken for a purpose to which they were not applied, or upon authority on which they were not subsequently holden. The defendant not being allowed to show that the original seizure was made by any lawful authority, and it being without the consent of the owner, it must of course be wrongful: *Purington v. Loring*, 7 Mass. 388; *Nelson v. Merriam*, 4 Pick. 249. The tortious taking of personal property is a conversion of it; and therefore trover will lie without demand and refusal. And

it may be laid down as a general proposition, that where *trespass de bonis asportatis* lies, trover will also lie. See the authorities cited by the plaintiff's counsel on this point.

It can not be pretended that the payment of the balance of the taxes and the taking a receipt for the whole, by the plaintiff, was any acquiescence in the illegal proceedings of the defendant, or any waiver of the right of action. The taxes he was bound to pay in full, and on failure was liable to another distress, or to a personal arrest and imprisonment. The purpose for which the receipt was required, is a sufficient explanation of that act, if indeed any were necessary.

The general rule of damages in actions of trover is, unquestionably, the value of the property taken at the time of its conversion. But there are exceptions and qualifications of this rule, as plain and well established as the rule itself. Wherever the property is returned, and received by the plaintiff, the rule does not apply. And when the property itself has been sold, and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases, and justice forbids its application. In all such cases the facts may be shown in mitigation of damages. These principles are supported by many adjudications, and are founded in equity and practical convenience: *Wheelock v. Wheelwright*, 5 Mass. 104; *Caldwell v. Eaton*, Id. 399; *Prescott v. Wright*, 6 Id. 20; *Squire v. Hollenbeck*, 9 Pick. 551 [20 Am. Dec. 506]; *Sheldon v. Sheldon*, 13 Johns. 220.

The rule which, for convenience, was adopted on the trial of this case, is not the correct one. The verdict, according to the arrangement entered into by the parties, must be amended by deducting the amount applied towards the payment of the plaintiff's taxes, and judgment must be rendered on it for the balance.

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- PURCHASE BY A TRUSTEE AT HIS OWN SALE, directly or indirectly, is against the policy of the law, and will be set aside on proper application by those beneficially interested: *Dorsey v. Dorsey*, 6 Am. Dec. 506; *Singstack v. Harding*, 7 Id. 669; *Davis v. Simpson*, 9 Id. 500; *Van Dyke v. Johns*, 12 Id. 76; *McCants v. Bee*, 16 Id. 610; *Murdock's Case*, 20 Id. 381; *Bruch v. Lantz*, 21 Id. 458; *Richardson v. Jones*, 22 Id. 293; *Armstrong v. Campbell*, 24 Id. 556. But only the beneficiary can question such a sale: *Wilson v. Troup*, 14 Id. 458; and if he acquiesce in it, he will be bound by it: *Van Dyke v. Johns*, 12 Id. 76; *Jennison v. Hapgood*, 19 Id. 258. The sale will not be vacated on the application of the trustee or his agent: *Richardson v. Jones*, 22 Id. 293, and note. A sale by a trustee to his co-trustee is a breach of trust for which both are liable: *Ringgold v. Ringgold*, 18 Id. 250. A purchase of the trust estate at sheriff's sale by a fraudulent trustee, pending litigation between

himself and the beneficiary, confers no title: *Keaton v. Cobb*, 18 Id. 595. In *Brannan v. Oliver*, 19 Id. 37, it is decided that a purchase by an administrator at his own sale is not void *per se*, but *prima facie* valid, where it appears that the sale was public, and that there was no unfairness in it.

TROVER LIES WITHOUT A DEMAND AND REFUSAL where the original taking was tortious, or there has been an actual conversion: *Woodbury v. Long*, 19 Am. Dec. 340; *Newsum v. Newsum*, Id. 739. Thus, an officer attaching the goods of a stranger, is liable in trover without a previous demand: *Woodbury v. Long*, 19 Id. 340. A sheriff selling property under process without a notice is liable in trover: *Wright v. Spencer*, 18 Id. 76. So, where he sells the goods of a stranger: *Jamison v. Hendricks*, 18 Id. 131. So where one's goods in the hands of a commission merchant are seized on execution against the latter: *Jones v. Sinclair*, 9 Id. 75. A mortgagee may maintain trover for a seizure of the mortgaged property under an execution against the mortgagor: *Sanders v. Vance*, 18 Id. 167.

OFFICER ABUSING HIS PROCESS BECOMES A TRESPASSER AB INITIO.—See, on this subject, *Barrett v. White*, 14 Am. Dec. 352 and note; and *Barrett v. Lightfoot*, 15 Id. 110. Thus, where an officer, after entering to levy on goods of an intestate, levies on goods of the administrator, he becomes a trespasser *ab initio*: *Hazard v. Israel*, 2 Id. 438. But mere non-feasance, such as failing to take due care of property after a levy, does not render the officer a trespasser *ab initio*: *Waterbury v. Lockwood*, 4 Id. 215.

SALE BY A COLLECTOR OF TAXES after the time fixed by statute is void, *ab initio*: *Noyes v. Haverhill*, 11 Cush. 340, following *Pierce v. Benjamin*. And generally, positive statutory regulations, respecting the sale of property without the owner's consent, must be strictly complied with, or no title will pass: *Alexander v. Pitts*, 7 Cush. 505, also citing the principal case.

MEASURE OF DAMAGES IN TROVER is generally the market value of the property at the time of conversion, with interest to the time of trial. See the note to *Baker v. Wheeler*, 24 Am. Dec. 71. So held also, citing the principal case, in *Parsons v. Martin*, 11 Gray, 116; *Bourne v. Ashley*, 1 Low. 28. The doctrine laid down in *Pierce v. Benjamin*, that where the property for which trover is brought, or its value, has gone to the benefit of the owner, the damages are to be proportionately reduced, is approved in *Cutting v. Grand Trunk Railway Co.*, 13 Allen, 388; *Perry v. Chandler*, 2 Cush. 242; *King v. Bangs*, 120 Mass. 515. So, especially, where the original taking was not willful: *Hanson v. Herrick*, 100 Mass. 327. The principal case is cited also as to the rule of damages in trover, in *Kaley v. Shed*, 10 Metc. 319; and *Merchants' Nat. Bank v. Bangs*, 102 Mass. 297.

HUNT v. HUNT.

[14 PICKERING, 374.]

MORTGAGEE HAS THE LEGAL ESTATE in realty, especially after entry for foreclosure, and may alienate and transfer it by any of the usual modes of conveyance, subject to the mortgagor's right of redemption.

MORTGAGEE HAS CONSTRUCTIVE POSSESSION before discharge or foreclosure, through the possession of the mortgagor, who is *quasi* tenant at will.

DEED OF QUITCLAIM AND RELEASE BY A MORTGAGEE for a pecuniary consideration to one not in possession, conveys the mortgagee's estate.

MORTGAGEE CONVEYING TO A PURCHASER OF THE EQUITY OF REDEMPTION, for a pecuniary consideration, by a deed of quitclaim and release, with warranty against himself and those claiming under him, passes his estate without merging or extinguishing the mortgage, as against a prior purchaser of the equity of redemption, where such was the manifest object of the conveyance.

MORTGAGOR CAN NOT DISSEISE THE MORTGAGEE, AS BY ERECTING BUILDINGS or other improvements on the land.

TRESPASS *quare clausum fregit* for cutting away a portion of the southern part of a certain mill-dam across Mumford's river, in Douglas. Pleas, the general issue, and soil and freehold in the defendants. A nonsuit was ordered, with leave to the plaintiff to move to set it aside, and for a new trial. The material facts are stated in the opinion.

Davis and Washburn, for the plaintiff, cited *Leonard v. White*, 7 Mass. 60 [5 Am. Dec. 19]; *Chase v. Hathaway*, 14 Id. 222; 1 Stark. Ev. 192; *Poignard v. Smith*, 8 Pick. 272; *Russell v. Coffin*, Id. 152; Com. Dig., Estoppel, B; *Wade v. Howard*, 6 Pick. 496; S. C., 11 Id. 289; *Maynard v. Hunt*, 5 Id. 240.

Hoar and Newton, for the defendants, cited *Gibson v. Crehore*, 3 Pick. 475; S. C., 5 Id. 146.

By Court, SHAW, C. J. The fact averred as a trespass being admitted, and both parties being desirous that the cause shall be considered and decided upon the general question of title, it has been argued upon that ground, and it has been so considered by the court. The conveyances set forth in the report have been so numerous and various, extending through a period of thirty years, that it is somewhat difficult to understand the precise question; and it requires a careful attention to dates and other particulars, to ascertain what the true questions of law are, and to render them intelligible. The small parcel of land about which the question of title arises, is the southerly half of a mill-dam across a stream known as Mumford's river, in the town of Douglas. Probably the right of soil involves also the water privilege incident to it, and renders it an object of value. Both parties claim under titles derived from Samuel Legg, and it is conceded by both that Legg was the undisputed owner of the soil in 1803.

Legg's farm was situated on the southerly side of the stream, and was bounded of course by the central line or thread of the stream. There was then no dam at the place. The first conveyance was that from Legg to Verry, in mortgage, to secure six hundred dollars, by deed dated April 4, 1803. The description

was of the whole farm, bounded northerly by the thread of the stream, and of course, large enough to embrace the soil upon which the southerly half of the dam now stands. Legg, the mortgagor, remained in possession several years, and at least until 1810, and during that period built the dam in question. At the time the dam was built, the land on the northerly or opposite bank of the river was owned by Craggin. Legg built the northerly half of the dam, and also a fulling-mill, on Craggin's land, with his permission. Such was the state of the title when Legg, by his deed of January 11, 1810, conveyed the fulling-mill to Benjamin Adams, together with the dam erected across said river and the flume, "to the south bank of said river," with the appurtenances. This deed, in terms embracing the whole of the dam to the south bank, included in its description the southerly half now in question, and this estate passed by Legg's deed to Adams, subject, however, to the mortgage to Verry. At that time Legg did not profess to own the land on the north side, but described the mill and northerly end of the dam as being on Craggin's land. But Craggin and Adams, by several conveyances, united their interests, and in regard to the plaintiff's title, without examining all the several steps, it is sufficient to say, that by various mesne conveyances, the estate thus conveyed by Legg to Adams, came to the plaintiff, and if he is not defeated by a title derived under Legg's mortgage to Verry, which was prior in time, he has established his title.

Whether the defendants can trace back their title to the mortgage from Legg to Verry in 1803, so as, in point of time, to overreach the plaintiff's title, is the question between the parties. That title is stated thus: On March 15, 1810, the equity of redemption of Legg, the mortgagor, was sold at an officer's sale; but the proceeding being informal, it is conceded that nothing passed, and that may be laid wholly out of the case.

But on March 24, 1810, Legg conveyed the farm to Thayer by a quitclaim deed. This deed embraced the whole farm to the thread of the river, and so was broad enough in its terms to include the southerly half of the mill-dam; still, that half of the dam could not pass by it, because the same Legg had, by his deed several weeks before, conveyed that part of his estate to Adams, who, as between these two deeds, had the elder and better title. The defendants, therefore, before they can succeed, must establish a title as derived from the earlier deed of Legg, being his mortgage to Verry.

It appears that Verry commenced a suit on his mortgage in May, 1810, obtained judgment, and had his writ of possession in 1811, and was put into possession by an officer, by force of the writ, in February, 1812.

In May, 1812, Verry conveyed the same premises to Asa Thayer, by a quitclaim deed, in usual form, with a covenant, that neither he, nor his heirs, nor any person claiming from, by, or under him or them, should have or claim any right, etc. This deed embraced in its description all that was included in Legg's mortgage to Verry, and of course included the southern half of the dam, being the place in controversy. Now, if the deed from Legg to Asa Thayer, of May, 1810, conveying his equity of redemption, is the foundation of the title claimed under Thayer, and the deed from Verry to Thayer is to be taken as a discharge of the mortgage, it is evident that the title derived through Thayer commenced at a later period than that derived through Adams, and of course must fail. But if the deed from Verry to Thayer was a good assignment of his mortgage, then the title derived through Thayer is the elder and better title. The great question therefore is, whether the quitclaim deed from Verry to Thayer, with covenants against himself, his heirs, etc., was an extinguishment and discharge of the mortgage, or an assignment and conveyance of the title created by it. This conveyance by Verry to Thayer was executed May 21, 1812, after Verry, the mortgagee, had been put into possession under his judgment against Legg; and it is stated in the report, that he thereby conveyed the same premises to Asa Thayer, by a deed of quitclaim, made in the usual form, containing a covenant of warranty against all persons claiming under him or his heirs. By this we are to understand that it was a deed given for a valuable consideration, using the terms "remise, release, and forever quitclaim" to the releasee, his heirs and assigns, the premises as described in his mortgage deed from Legg.

A mortgagee, especially after entry for foreclosure, is considered as having a legal estate, which may be alienated and transferred, by any of the established modes of conveyance, subject only, until foreclosure, to be redeemed by the mortgagor. It seems clear, therefore, that if this had been a deed in the usual form of words, "give, grant, sell and convey, release and quitclaim," and if it is apparent that it was the intention of the releasor to transfer, and of the releasee to receive the legal seisin, title, and interest in the estate, and not to cancel and

extinguish the mortgage, the deed would so have operated to pass the mortgagee's legal title, and we are of opinion that such is the effect of the deed in the present case.

Courts of law have gone very far in modifying the rules of conveyance, both those of the common law and those which have their effect from the statute of uses, so as to give effect and operation to the deeds of parties, rather according to the manifest intent, than according to the force of the particular words used to effect the conveyance. So that where it is manifest, from the efficient words of conveyance used, that it was intended and understood, that the estate should pass, in one way, as by feoffment, bargain and sale, covenant to stand seised, or release, but some of the circumstances are wanting, which by the rules of law are necessary to pass the estate in that form, and it can not so pass, yet if all the circumstances exist, which are sufficient to pass the estate in another form, the court will construe it to be a conveyance of such form, notwithstanding the words used are not properly adapted to that purpose, so as to give it effect, and cause the estate to pass.

So the common deed of this commonwealth, using the words give, grant, bargain, sell, and convey, made to one to the use of another, will be construed to be a feoffment and not a bargain and sale; if it were construed a bargain and sale, it would raise a use only to the bargainee, and then, by the well-known rule of the law, no further use could be limited on that use, and the obvious purpose of the conveyance would fail. But by construing it to be a feoffment, a common law conveyance, by which the estate would pass without the intervention of the statute of uses, the use declared upon it would take effect and be executed by the statute: *Thatcher v. Omans*, 3 Pick. 521. This construction was adopted solely in pursuance of the rule of giving effect to the intent; because the words were altogether as apt to create a bargain and sale as a feoffment.

So a bargain and sale, which could not operate in that form, because it would operate to create a freehold commencing in *futuro*, shall be construed to be a covenant to stand seised to uses, where the intent is apparent, and the consideration is such as to enable a court so to construe it: *Parker v. Nichols*, 7 Pick. 111. In *Welsh v. Foster*, 12 Mass. 93, the difficulty was that the deed could not take effect to pass an estate in any form, for want of some of the requisites adapted to each; and besides, the deed was to take effect upon a contingency which might not

happen within the time limited by law for the vesting of estates, to prevent the creation of perpetuities.

In an English case, in the time of Lord Mansfield, a release was construed to operate as a grant of a reversion, in order to effectuate the intention of the parties: *Goodtitle v. Bailey*, Cowp. 597. But we think the point has been settled in this commonwealth by several decisions. A release to one not in possession, if made for a valuable consideration, will be construed to be a bargain and sale, or other lawful conveyance, by which the estate may pass: *Pray v. Pierce*, 7 Mass. 381 [5 Am. Dec. 59]. So a grantee, not having been in actual possession of the premises, otherwise than by considering the grantor remaining in possession as his tenant at will, executed to a purchaser for a valuable consideration a deed of conveyance by release and quitclaim, in the form in common use in Massachusetts, and it was held that this was a sufficient conveyance to pass the estate, though the releasee had not any previous interest in, or possession of the estate: *Russell v. Coffin*, 8 Pick. 143.

Now, in the present case, all the circumstances concur which would be requisite to give the conveyance effect as a bargain and sale. These requisites are, that it must be upon a pecuniary consideration; it must be to the use of the bargainee, and not a third person, to take effect immediately on the execution of the deed; and it must be enrolled. It would seem, therefore, within the reason of the authorities, that if a grantor has a legal seisin only, and neither the grantor nor grantee has possession, that the estate would pass by a deed of release and quitclaim, where all the requisites exist and appear upon the deed to give it effect as a bargain and sale.

But it is not necessary to maintain the position to this extent in the present case. But supposing actual or constructive possession necessary to give effect to the deed of release and quitclaim, upon a pecuniary consideration, here there was such constructive possession in the releasor, bringing it quite within the authority of the case last cited.

By force of the mortgage deed, the mortgagee becomes seised of the estate, and the mortgagor, until discharge or foreclosure of the mortgage, is *quasi* tenant at will of the mortgagee, and so the possession of the mortgagor is that of the mortgagee. This brings it precisely within the principle decided in *Russell v. Coffin*, where the estate was in the possession of the tenant at will of the releasor, and yet a deed of release and quitclaim

to a stranger, for a valuable consideration, was held to pass the estate.

I have not relied here upon the consideration, that Verry had recovered judgment, and been put into actual possession, under his writ of seisin, which would render the deed of quitclaim conclusive as to all of which he was thus in actual possession, because, although his suit embraced all the estate included in his mortgage, and the judgment followed the writ, yet I presume Adams was not made party, and, as Legg had conveyed the half of the dam to Adams, prior to this suit, to the extent of that portion of the dam, the judgment on the mortgage, against Legg, may not perhaps be considered binding and effectual, and therefore it may be contended, that the writ of possession executed did not change the relation of Verry, as to that part of the mortgaged premises. I consider it, therefore, as standing upon the same footing, as the whole of the mortgaged premises did before the suit, when the mortgagee had the legal seisin, and the right of possession, and the mortgagor was in the nature of his tenant at will.

Nor, in order to give effect to this quitclaim deed, have I considered Thayer as in possession under his previous deed of the equity of redemption from Legg; because, as to the dam, Legg had previously conveyed to Adams, so that as to that part of the premises, Legg's deed to Thayer was inoperative and passed nothing, and so as to that, Thayer was not in possession, in virtue of his deed from Legg.

But it has been contended, and upon this the case of the plaintiff mainly rests, that Thayer, having purchased the equity of redemption of Legg, when he subsequently took the quitclaim deed of Verry, must, by operation of law, be considered as having paid and discharged the mortgage by which the mortgage itself became merged in the equity and extinguished, so that a title can no longer be claimed under it. But we think this position can not be maintained. We have already stated that the mortgagee had a perfect right and legal power to assign his mortgage, if he thought fit, and to give to his assignee the same right which he held himself, that is, to receive the amount secured by the mortgage, from any person entitled by contract or by operation of law to redeem, and to hold the legal estate in security of the debt till it should be so paid. And we can see no reason why a purchaser of the equity of redemption, whether of a part or the whole of the mortgaged premises, is in any respect disabled from becoming such

assignee. He may consider his equity of redemption of no value, or of small value, or the title to it invalid or doubtful; and can there be any reason in law why he who has the most urgent occasion for making such a purchase to protect his own interest, should be disabled from doing so, and be placed in this respect in a worse condition than a stranger.

We think this case was considered and settled in the case of *Gibson v. Crehore*, 8 Pick. 475, which was in principle like the present. The defendant first purchased the equity of redemption, and then took an assignment, and as against a widow claiming a right of dower, it was held that the mortgage was not extinguished.

We think there is abundant reason why no such merger and extinguishment should take place, by operation of law, against the intent of the parties. Suppose a man in good credit mortgages his real estate to two thirds of the value to A. Subsequently it is attached by B., upon a secret attachment, not known to a subsequent purchaser, or if the mortgagor be in failing circumstances, it may be attached upon various or doubtful claims, or claims which may prove to be secured upon other property. Subsequently C. purchases the equity of redemption. To protect his own interest, he must obtain from the first mortgagee either an assignment or extinguishment of the mortgage. If the latter, he may let in all the claims of attaching creditors, or second purchasers, and lose all the money he has paid to discharge the mortgage. If the former, then he will stand, as he ought, in the place of the first mortgagee, with an unquestioned title to the extent of the money paid for such assignment as against all subsequent claimants; so that, if they would redeem, they must first repay to him, as assignee, the amount of the mortgage, leaving them to stand towards him in his capacity of purchaser of the equity, according to their legal and equitable rights, in exactly the same manner as they would have stood towards the first mortgagee himself. This is doing perfect justice to all parties. Those who have claims subsequent to the mortgage, may, if they have the right and think fit, redeem the mortgage alone, leaving the assignee to his rights as purchaser of the equity.

And so the rule was laid down in the case cited: "Where a purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking the assignment may be, and according to the real intent of the parties." And we

think the same result follows from considering the rule of law in relation to merger. In the case cited, it is said that mergers are odious in equity, and shall not be allowed where the estates may well stand together. Here, we think, that both in law and equity the estates may well stand together.

In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely co-extensive, must be acquired and held in the same right, and there must be no right outstanding in a third person, to intervene between the right held and the right acquired. If any of these requisites are wanting, the two rights do not merge, but both may well stand together. But the case we are considering supposes that a third person has, by operation of law, by purchase, or by attachment, acquired certain rights or claims to the equity of redemption, which do not extend to the mortgage. When, therefore, the equity of redemption by purchase, and the mortgage by assignment, vest in the same individual, they do not coalesce or merge, if there be in a third person a right of dower, a right acquired by purchase, or a real lien by attachment, intervening between the mortgage and the equity. In such case, therefore, the estates may well stand together, and the mortgage must be kept on foot to enable such dowress, after-purchaser, or attaching creditor, to enjoy and enforce their respective legal and equitable rights.

We think the present case is entirely within these principles. It is apparent from the form of the deed of quitclaim, from the qualified covenant against incumbrances, and from the manifest object of the parties, that it was the intent of the mortgagee, not to discharge his mortgage, but to sell and transfer his legal title in the mortgaged premises, by the species of conveyance long known and used in this commonwealth, when the intent is to pass an estate without warranty. As Verry had a good right to assign, as Thayer was capable of receiving, as the form of the deed, in relation to which the parties stood, was sufficient to effect this transfer, and as it was the intent of the parties, and consistent with the rules of law, that the interest and estate of the mortgagee should pass by the deed, we are of opinion that it did extend to, and include the small portion of the dam now in controversy.

In taking this view of the subject, a question arose, whether, at the time of the quitclaim deed by Verry to Thayer, in 1812, Verry was not disseised, so that no estate passed by his deed.

And we think that Verry, the mortgagee, was not disseised. It was held in a late case that a mortgagee as well as a mortgagor could be disseised by a stranger. But it must be by an actual ouster and exclusive occupation, and not by a qualified and occasional use of the land: *Poignand v. Smith*, 8 Pick. 272.

But it is very clear that a mortgagee can not be disseised by the mortgagor; being tenant at will, his possession is not adverse, and any buildings, improvements, or erections placed by the mortgagor upon the land must be considered as improvements upon the estate mortgaged, made by the mortgagor as owner of the equity of redemption, and can not be deemed a disseisin. The mortgagor in such case must be considered as making improvements upon his own estate, of which he has the full benefit in the enhanced value of the equity of redemption. In the present case the facts show that, after the mortgage by Legg to Verry, the dam was built by Legg himself, some time between the years 1803 and 1810. This erection of the dam, therefore, regarding it as a structure or building like a house, did not operate as a disseisin of the mortgagee because placed upon the premises by the mortgagor. And it does not appear that, after the conveyance of this dam by Legg to Adams, the latter, or any one under him, ever did any act of ownership on that part of the dam, or even ever entered upon it, prior to May, 1812, when Verry conveyed to Thayer. There appears, then, no building upon the land, no inclosure, none of those acts of actual ouster and exclusive possession, which can be deemed to amount to a disseisin of the mortgagee, except those done by the mortgagor, and his acts could not amount to a disseisin. We think, therefore, that Verry was not disseised when he made his deed to Thayer, and therefore it can not be objected upon that ground that nothing passed by the deed.

Another question arose, namely, whether after the old dam was washed away by the floods in 1823, the erection of a new one on the same site by Craggin and Adams, claiming under an adverse title, was not an ouster of Asa Thayer. But this question has become immaterial, because if these acts did amount to a disseisin, the right of entry remained to Asa Thayer, and, as appears by the statement of facts, duly came to his sons, who seasonably entered upon the premises, and there executed the deed to the defendants, under which they claim. If they had been disseised, this entry vested the seisin in them again, and the deed being delivered by them on the premises, the defendants became seised.

We are of opinion, therefore, that the defendants have the better legal title, coming in as they do by a title derived from the mortgagee; that the plaintiff, claiming through a deed made by the mortgagor after the mortgage, necessarily took a title subject to the mortgage, and as the mortgage has never been discharged, the defendants have the elder and better title. If the plaintiff has any claim, it must be only an equitable right, a right to redeem, which depends upon facts and questions not now before the court, and of which we give no opinion.

Nonsuit confirmed.

MORTGAGE IS A MERE SECURITY in most of the United States, and the mortgagor is regarded as the owner, subject to the lien created by the mortgage: *Hitchcock v. Harrington*, 5 Am. Dec. 229, and note; *Wilson v. Troup*, 14 Id. 458, and note; *Morris v. Mowatt*, 22 Id. 661. But the mortgagee is recognized as the owner in Maine, and therefore an assignment of his interest must be by deed: *Vose v. Handy*, 11 Id. 101, and note.

CONVEYANCE BY MORTGAGEE, EFFECT OF.—See, on this point, the note to *Wilson v. Troup*, 14 Am. Dec. 474. That such a conveyance operates as an assignment of the mortgage and passes the mortgagee's interest is held, citing *Hunt v. Hunt*, in *Murdock v. Chapman*, 9 Gray, 158; *Ruggles v. Barton*, 13 Id. 507; *Kilborn v. Robbins*, 8 Allen, 472. The doctrine of the principal case on this point is disapproved in *Peters v. Jamestown Bridge Co.*, 5 Cal. 33, where it is held that such a conveyance does not operate as an assignment of the mortgage. In that case Heydenfeldt, J., who delivered the opinion, said: "The deed from Perry to plaintiff could not operate as an assignment of the mortgage. The latter is a mere security for the debt, and can not pass without a transfer of the debt; so it would seem that the two transactions are totally different in character; the intent of the one is to convey the title to land, of the other, to transfer a debt with its security. If a contrary doctrine was maintained, it would produce the evil (as in this case), of enabling a net to be thrown for the entrapment of the innocent. The law always must favor the principle, that what is intended to be done must be done directly. Two cases are cited by the respondent's counsel, which seem to point to a different conclusion. I have examined them, and find them unsustained by authority, or by the best reasoning: 14 Pick. 374, and 15 Id. 82."

MERGER OF MORTGAGE IN EQUITY OF REDEMPTION.—For a discussion of this subject, see the note to *James v. Morey*, 14 Am. Dec. 512. The doctrine of merger is not favored in equity, and merger will not be presumed contrary to the interest of the party in whom both titles vest: *James v. Morey*, Id. 475. The question as to whether or not the mortgage shall merge in the equity of redemption, when both unite in the same person, depends upon his actual or presumed intention in the premises, and he will be presumed to intend what is most for his advantage: *Freeman v. Paul*, 14 Am. Dec. 237. But in *Gardner v. Astor*, 8 Id. 465, it was determined that where a redemptioner pays the mortgage and takes an assignment of it, it will be extinguished unless there appears to be some beneficial interest in keeping it distinct. The doctrine laid down in the principal case, that the owner of the equity of redemption may become assignee of the mortgage without extinguishing or merging the

mortgage, where he has an interest in keeping them separate, as where there is some intervening right in another, is approved in *Grover v. Thatcher*, 4 Gray, 527; *Savage v. Hall*, 12 Id. 365; *Evans v. Kimball*, 1 Allen, 242; *Strong v. Converse*, 8 Id. 560; *Freeman v. McGaw*, 15 Pick. 86. But the two titles generally coalesce on uniting in the same person if there is no outstanding right in another to keep them apart: *Carlton v. Jackson*, 121 Mass. 595, citing the principal case.

THAT A MORTGAGEE CAN NOT BE DISSEISED BY THE MORTGAGOR, especially after entry, is held, on the authority of *Hunt v. Hunt*, in *Lennon v. Porter*, 5 Gray, 320. But he may be disseised by a stranger, though, for this purpose, there must be an actual ouster and exclusive occupation: *Dadmun v. Lamson*, 9 Allen, 88.

The principal case is cited also in *Conway v. Ashfield*, 110 Mass. 114, to the point that where a deed declares the uses in the first taker, the statute of uses will not execute a second use charged upon the first. It is cited also in *Winslow v. Merchants' Ins. Co.*, 4 Metc. 312. The case of *Hunt v. Hunt* was again brought before the supreme court on a bill filed by the plaintiff to redeem: 17 Pick. 118. The bill was dismissed. The questions raised were not the same as those discussed in the foregoing opinion.

HEMMENWAY v. WHEELER.

[14 PICKERING, 408.]

QUESTION OF FRAUD IN CONCEALING AN ATTACHMENT must be put in issue and tried by the jury, if intended to be relied on in support of a subsequent attachment.

ATTACHMENT OF BULKY ARTICLES, SUCH AS HEWN STONES, lying on a stranger's land, by the officer's going among them and declaring that he attaches them, and leaving a receptor in charge, without removing them, or giving notice to any one in the vicinity, is sufficient as against a subsequent attachment without notice thereof.

NOTORIETY IS UNNECESSARY to an attachment of personalty.

CONTINUED ACTUAL POSSESSION IS UNNECESSARY to continue an attachment, and it is sufficient if the officer's custody, varying with the nature and position of the property, is such as to enable him to retain and assert his control over it, so that probably it can not be interfered with without his knowledge.

LEAVING HEWN STONES IN CHARGE OF A RECEPTOR who resides near and in sight of them, is sufficient, without removing them, to preserve an attachment as against a subsequent attachment without notice.

REPLEVIN for certain hewn stones. Plea, that they were the property of Temple & Washburn. Both the plaintiff and defendant were deputy sheriffs, who had attached the stones on writs against Temple & Washburn, in favor of different creditors, the plaintiff's attachment being prior in time. The stones, when attached, were lying on certain land of the commonwealth. The plaintiff went among and upon them, and declared that he attached them, and left them in charge of the

attaching creditor, who receipted for them. They were not removed. The receiptor's residence and place of business were both within sixty rods and in sight of the stones. No notice of the attachment was given to any one in the vicinity, though there were several persons who worked and resided near. There was evidence that the attaching creditor informed a certain person summoned as trustee in the same writ, that he had attached the stones, but that he did not wish him to inform any one of it, as he did not desire to injure the credit of Temple & Washburn. The defendant attached the same property on another writ, without any notice of the previous attachment, though he made inquiry on that point.

Merrick and Kinnicutt, for the plaintiff, cited *Baldwin v. Jackson*, 12 Mass. 131; *Train v. Wellington*, Id. 495; *Bridge v. Wyman*, 14 Id. 190; *Bagley v. White*, 4 Pick. 395 [16 Am. Dec. 353]; *Ashmun v. Williams*, 8 Id. 402.

C. Allen and Towne, for the defendant, cited *Bagley v. White*, 4 Pick. 395 [16 Am. Dec. 353]; *Bridge v. Wyman*, 14 Mass. 190; *Denny v. Warren*, 16 Id. 420; *Gordon v. Jenney*, Id. 465; *Baldwin v. Jackson*, 12 Id. 131; *Train v. Wellington*, Id. 495.

By Court, SHAW, C. J. If any question of fraud were intended to be raised in the present case; if it were contended that the plaintiff had designedly concealed his attachment with a view to defraud other creditors, that fact should have been put in issue and tried by a jury. The question therefore is, whether the prior attachment made by the plaintiff was sufficient to bind and hold the property against the after attachment made by the defendant.

The evidence shows that there was a sufficient seizure of these bulky articles to constitute an attachment. The officer went to the place where the stones were, and upon and among them, declaring that he attached them: *Train v. Wellington*, 12 Mass. 495.

And we think he remained in the constructive possession in such manner as to continue the attachment in force. Notoriety is not necessary to give effect and validity to an attachment of personal property. It is not necessary to continue an attachment that an officer or his agent should remain constantly in the actual possession: *Gordon v. Jenney*, 16 Mass. 465; *Ashmun v. Williams*, 8 Pick. 402; see, also, *Fettyplace v. Dutch*, 13 Id. 388 [23 Am. Dec. 688]. The nature of the possession and custody which an officer is to keep, will depend upon the nature

and position of the property, as ships, rafts, piles of lumber, masses of stone, or lighter, more portable, and more valuable goods. In general it may be said, that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it can not probably be withdrawn, or taken by another, without his knowing it. Here it is manifest that the officer did not intend to abandon the attachment, and that the measures which he took, considering the bulky nature of the property and the situation in which it was placed, were sufficient to continue his possession and preserve his attachment.

Defendant defaulted.

WHAT NECESSARY TO CONSTITUTE AN ATTACHMENT OF PERSONALTY.—See *Hollister v. Goodale*, 21 Am. Dec. 674, and the note thereto. Actual or constructive possession is necessary: *Knap v. Sprague*, 6 Id. 64; *Hollister v. Goodale*, 21 Id. 674. The property must be under the control of the officer: *Haggerty v. Wilber*, 8 Id. 321; *Odiorne v. Colley*, 9 Id. 39. Where goods were in the hold of a vessel covered by other goods, and the officer went on board and said he attached them, but did not go where they were or see them, and left a keeper in charge, who took actual possession several days afterwards, when the goods were hoisted out of the hold, the attachment was held sufficient: *Naylor v. Dennie*, 19 Am. Dec. 319. The principal case is cited in *Reed v. Howard*, 2 Metc. 38; *Polley v. Lenox Iron Works*, 4 Allen, 331, and *The Ship Orpheus*, 3 Ware, 145, in support of the rule that only such acts of notoriety as to attachment and custody as the state of the case and the nature of the property would reasonably demand are required, where the removal of the goods is entirely impracticable or would be exceedingly expensive and inconvenient. The general rule is that the officer must take and keep possession, so as to be able to make delivery to a purchaser on execution: *Heard v. Fairbanks*, 5 Metc. 113, where Hubbard, J., says on this point: "There are some cases which seem to speak a contrary doctrine, and in which attachments have been sustained, where the property, though personal, was not reduced to the actual possession of the officer; such as the attachment of blocks of granite, a house on another person's land, a barn full of hay, etc.: *Hemmenway v. Wheeler*, 14 Pick. 408. But these decisions were not intended to disturb the law requiring the officer to take possession of personal property, but were merely relaxations of the rule upon the subject, owing to the ponderous and bulky nature of the property to be attached; and, to meet such cases, adequate provision is now made in the Rev. Stata. c. 90, sec. 33." In that case it was decided that, to levy an attachment upon standing corn and potatoes in the ground, they must be severed from the realty.

LOSS OF ATTACHMENT BY NOT RETAINING POSSESSION.—See *Bagley v. White*, 16 Am. Dec. 353, and *Fettyplace v. Dutch*, 23 Id. 688.

SIGOURNEY v. EATON.

[14 PICKERING, 414.]

ON SIMULTANEOUS ATTACHMENTS OF THE SAME LAND by different creditors and executions thereunder, they take in moieties without regard to the amount of their respective executions.

WHERE THE PROPERTY ATTACHED IS AN EQUITY OF REDEMPTION, the same principle applies.

WHERE ONE EXECUTION IS FOR LESS THAN A MOIETY of such property, the surplus is applied to the other.

BILL to determine the plaintiff's right to one half the rents and profits of certain realty. The agreed facts were that the parties had made simultaneous attachments of certain realty as the property of their common debtor, and of the debtor's equity of redemption in certain other realty which he had mortgaged. The property attached was not sufficient to satisfy either claim, the defendant's being the larger of the two. Executions which had been issued and levied on the first parcel of land were apparently returned as satisfied to the full appraised value of said land. The equity of redemption in the other parcel was sold under the executions, and by agreement between the present parties, was bid off by the defendant, to be held by the parties in proportion to their respective rights under their attachments. The defendant had received the rents and profits of both parcels up to the filing of the bill. The plaintiff demanded one half, but the defendant claimed that the division should be made in proportion to the amount of the respective executions of the parties. If the plaintiff's position was correct, the defendant was to be defaulted, otherwise a nonsuit to be entered.

Barton, for the plaintiff, cited Co. Lit. 21 a, and note 126; *Countess of Rutland's case*, 5 Co. 25; *Shove v. Dow*, 13 Mass. 529.

Newton, for the defendant.

By Court, SHAW, C. J. The court are of opinion that as to the land levied on by execution, and also as to the equity of redemption, the parties, by their attachments, took in moieties, without regard to the amount of their respective executions. The principle is this, that each, by his attachment, obtained a lien on the property in security of his debt, which would be valid for the whole but for the attachment of the other. But the attachments being simultaneous, as between themselves,

neither can claim priority. They hold not in shares or proportions, but *per mie et per tout*, and upon a division neither can appropriate to himself more than a moiety.

This principle is to be applied, of course, with this qualification, that as the attachment constitutes a lien in security of a debt, if the moiety which either can hold is more than sufficient to satisfy his debt, the surplus will go to the other.

The mode in which the officers returned the levy on their executions, each being apparently returned satisfied to the amount of the appraised value, may cause some difficulty, and indeed the whole subject of simultaneous attachments is full of difficulties. It would seem that if the officer returned the whole appraised value of the land, on the smaller execution, it must be deemed satisfaction *pro tanto*; but we are inclined to the opinion that the officer might have returned, according to the truth of the case, that in consequence of a simultaneous attachment made by another creditor, the creditor in this execution, in legal effect, took a moiety only of the estate levied on, and so, that the execution was satisfied to the amount of one half of the appraised value. But as the parties in this case have agreed upon the facts, without making any technical question as to the form of the return, their respective rights are to be settled upon the principle above stated.

SIMULTANEOUS ATTACHMENTS OR EXECUTIONS, regularly levied, constitute the attachment or execution creditors tenants in common in equal proportions: *Perry v. Adams*, 3 Metc. 54, citing the foregoing decision. It is also referred to in *Davis v. Davis*, 2 Cush. 114.

HATTON v. ROBINSON.

[14 PICKERING, 416.]

CONFIDENTIAL COMMUNICATIONS BETWEEN AN ATTORNEY AND CLIENT are not to be revealed in any action or proceeding between others, even after the relation of attorney and client has ceased.

PRIVILEGE IS THAT OF THE CLIENT, and continues until voluntarily waived by him.

PRIVILEGE EXTENDS ONLY TO COMMUNICATIONS TO AN ATTORNEY OR COUNSELOR when applied to and acting as such, and to those whose intervention is strictly necessary to enable the client to communicate with his attorney.

COMMUNICATIONS MADE TO THE ATTORNEY BY A THIRD PERSON in the presence of the client are not privileged.

COMMUNICATIONS NOT MADE FOR THE PURPOSE OF OBTAINING THE LEGAL ADVICE or opinion of the attorney, or instructing him in a cause, or engaging him in the conduct of professional business, are not privileged.

COMMUNICATIONS MADE TO AN ATTORNEY EMPLOYED TO DRAW A MORTGAGE, gratuitously, or merely for the purpose of satisfying the attorney's scruples as to the character of the transaction, and without any view to obtaining his professional advice or opinion, are not privileged.

TRESPASS for taking certain chattels. Plea, the general issue. The defendant claimed to have attached the goods as the property of one Winch. The plaintiff, Hatton, claimed under a bill of sale from Winch. To prove that this bill of sale was fraudulent, the defendant offered in evidence the deposition of Sarguel Ames, Esq., to which the plaintiff objected on the ground that the said Ames was employed by Winch and Hatton as an attorney to draw the bill of sale, and that all that he knew of the matter had been communicated to him in that capacity, and was privileged. The bulk of the deposition consisted of communications made by Winch to the witness when he called on him to draw the conveyance. The substance of these communications was that Winch was considerably indebted in Rhode Island and Massachusetts, and was about to remove to New York; that his Massachusetts creditors were about to attach his property for certain old debts; that he wished to convert such property into money as soon as he could do so at a fair price, and pay first his debts in Rhode Island, as they were of more recent date, and as it was through credit obtained from his creditors there that he had acquired what property he had; that he desired to leave his property with the plaintiff to sell for him, and to apply the proceeds first in payment of the Rhode Island creditors, and to protect such property from attachment by the Massachusetts creditors; and the deponent thereupon consented to draw the bill of sale. The witness' legal advice or opinion upon the facts disclosed to him was not asked. The witness also deposed to certain statements made to him by the plaintiff, Hatton, when the bill of sale was drawn. The deponent was paid by Winch for drawing the said bill of sale. The deposition was admitted, and the plaintiff became nonsuit. If the admission of the deposition was error, the nonsuit was to be set aside, and a new trial granted.

Merrick and Bottom, for the plaintiff, cited *Cromack v. Heathcole*, 2 Brod. & B. 4; *Gainsford v. Grammar*, 2 Camp. 9; *Rex v. Withers*, Id. 579; *Wilson v. Rastall*, 4 T. R. 753; 2 Stark Ev. 395; 1 Id. 104; *Anon.*, 8 Mass. 370; *Baker v. Arnold*, 1 Cai. 258; *Bramwell v. Lucas*, 2 Barn. & Cress. 743.

Newton, Lincoln, and Child, for the defendant, cited 1 Stark. Ev. 104; *Wadsworth v. Hamshaw*, 2 Brod. & B. 5, note; *Williams*

v. *Mundie*, Ry. & M. 34; S. C., 1 Car. & P. 158; *Broad v. Pitt*, 3 Id. 518; *Cobden v. Kendrick*, 4 T. R. 431; *Duffin v. Smith*, Peake, 108; *South Sea Co. v. Dolliffe*, cited in 2 Atk. 525; *Brandt v. Klein*, 17 Johna. 335; *Bramwell v. Lucas*, 2 Barn. & Cress. 745.

By Court SHAW, C. J. The only question for the court in the present case is, whether the deposition of Mr. Ames was properly admitted in evidence; and this depends upon the further question, whether the matters testified to by him, were to be considered as within the rule of privileged communications. Another question was indeed made, namely, whether the deposition should have been wholly rejected; or if a part were objectionable, as being privileged, the objection should not have been confined to such part. But as by far the greatest part of the deposition, both in bulk and importance, was alike open to the objection, and the part that would remain would be almost, if not wholly immaterial, the objection at the trial seems to have been made to the deposition, without exception to that course, when it should in strictness have been made to the disclosure of the supposed privileged communication. But the case has been argued upon the same grounds as if the objection had been thus taken, and we shall so consider it.

The rule upon which the plaintiff's counsel in the present case relied to exclude all that part of the testimony of Mr. Ames, which consisted of statements made to him by Winch, as to his views and motives in making the sale, upon which the plaintiff found his title, is that well-known rule of evidence founded on the confidence which a client reposes in his counsel, attorney, or solicitor. By this rule it is well established, that all confidential communications between attorney and client are not to be revealed at any period of time, nor in any action or proceeding between other persons; nor after the relation of attorney and client has ceased. This privilege is that of the client, and not of the attorney, and never ceases, unless voluntarily waived by the client.

We had occasion lately to consider this subject in the case of *Foster v. Hall*, 12 Pick. 89 [22 Am. Dec. 400], which was not published at the time this cause came before the court, in which it was decided that the privilege was not confined to the case of communications made to an attorney with a view to the prosecution of a suit or legal process, pending or immediately contemplated at the time of the communication; but that it extends to all communications made to an attorney or coun-

selor duly qualified and authorized as such, and applied to by the party in that capacity, with a view to obtain his advice and opinion in matters of law in relation to his legal rights, duties, and obligations, whether with a view to the prosecution or defense of a suit, or other lawful object. This extent and modification of the rule, we thought, was well supported by the weight of authority, and consistent with the principle upon which the rule is founded. This principle we take to be this, that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed. To the rule as thus stated, we are still inclined to adhere.

But the privilege of exemption from testifying to facts actually known to the witness, is in contravention to the general rules of law; it is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy upon which it is allowed. It is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other as an interpreter, agent, or attorney's clerk. And this privilege is confined to counsel, solicitors, and attorneys, when applied to as such, and when acting in that capacity: *Wilson v. Rastall*, 4 T. R. 753.

But there are many cases in which an attorney is employed in transacting business not properly professional, and where the same might have been transacted by another agent. In such case the fact that the agent sustains the character of an attorney does not render the communications attending it privileged, and they may be testified to by him as by any other agent. In *Wilson v. Rastall*, already cited, Buller, J., says, that the privilege is confined to the case of counsel, solicitor and attorney, and it must be proved that the information was communicated to the witness in one of those characters, for, if he be employed merely as steward, he may be examined.

So where the matter is communicated by the client to his attorney for purposes in no way connected with the object of the retainer and employment of the attorney as such: *Cobden v. Kendrick*, 4 T. R. 432. The court say, the difference is, whether the communications were made by the client to the attorney, in confidence, as instructions for conducting his cause, or a mere *gratis dictum*.

And so strictly is the rule held that the privilege extends only to communications made by the client to his attorney, for the purpose of obtaining legal advice, that in a late case it was held that a communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause: *Bramwell v. Lucas*, 2 Barn. & Cress. 745.

Looking at the deposition of Mr. Ames, with these views in respect to the legal privilege of communications between attorney and client, it appears quite manifest that the rule of exemption does not apply to any communication made by Hatton, the plaintiff, inasmuch as it does not appear that the witness was applied to by him, or that the relation of attorney and client in any respect subsisted between them. In regard to those communications, therefore, it appears to the court that the witness can not be exempted from testifying.

But upon examining the other part of Mr. Ames' deposition, we can not perceive that the communications were made to him by Winch with the purpose of instructing him in any cause, or engaging him in the conduct of any professional business, or of obtaining any legal advice or opinion. If the disclosure of his views and purposes, in the conveyance of property proposed to be drawn, was not, as stated in some of the books, a mere *gratis dictum*, the only purpose seems to have been to satisfy Mr. Ames' mind, and remove any scruple that he might entertain, as to the character of the transaction, and to convince him that whatever might be the legal character of the act, it was not attended with moral turpitude. It did satisfy him that he was not to be engaged in a conspiracy to cheat, and induced him to consent to draw the deed. Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law, and none given. We are therefore necessarily brought to the conclusion that either these disclosures were made without any particular motive, or if there was a purpose connected with the proposed draft, it was to sat-

isfy Mr. Ames' mind upon a point of fact, not for the information of his own in point of law, and in either event they are not to be deemed privileged communications, which the witness was prohibiting from disclosing. The whole deposition therefore was rightly admitted, and conformably to the case agreed, the nonsuit must stand.

CONFIDENTIAL COMMUNICATIONS TO COUNSEL acting in a professional capacity, whether made under an injunction of secrecy or not, or for the purpose of asking advice or otherwise, are privileged, and an attorney employed to draw a deed is considered as acting in the line of his profession: *Parker v. Carter*, 6 Am. Dec. 513. Communications and instructions relative to the management or defense of a cause are, of course, privileged: *Riggs v. Denniston*, 2 Id. 145. Such communications can not be revealed after the termination of the suit: *Chase's case*, 17 Id. 277. The privilege extends to all communications made to a member of the legal profession, acting in that capacity, for the purpose of procuring advice, whether connected with the conduct of a cause in court or not: *Foster v. Hall*, 22 Id. 400. This privilege is that of the client: *Chase's case*, 17 Id. 277; *Foster v. Hall*, 22 Id. 400. It is confined strictly to communications to members of the legal profession, and to interpreters, and perhaps clerks acting as the medium of intercourse between attorneys and their clients: *Jackson v. French*, 20 Id. 699; *Foster v. Hall*, 22 Id. 400. It does not cover communications made to a student in a lawyer's office, for the purpose of obtaining his advice, even though the party making them supposes the student to be an attorney: *Barnes v. Harris*, 7 Cush. 577, quoting, with approval, the language of Chief Justice Shaw in the principal case, as to the extent of the privilege. Third persons who happen to be present when communications are made by a client to his attorney, are not privileged from testifying concerning them: *Jackson v. French*, 20 Id. 699. And an attorney is not privileged from testifying to statements made in his presence between his client and third persons: *Gallagher v. Williamson*, 23 Cal. 334, approving the principal case. It is approved also in *Hay v. Morris*, 13 Gray, 520, 521. An attorney may testify to collateral facts not ascertained from his client, such as the client's handwriting, although the attorney's knowledge of it is acquired by seeing the client write in the course of communications between them after the suit was commenced: *Johnson v. Davenport*, 10 Am. Dec. 198. Nor is he privileged from testifying to facts which he might have known without being the attorney of the party: *Stoney v. McNeil*, 18 Id. 666.

COMMONWEALTH v. MERRIAM.

[14 PICKERING, 518.]

ON AN INDICTMENT FOR ADULTERY, EVIDENCE OF PREVIOUS IMPROPER FAMILIARITY between the parties is admissible to corroborate a witness who has testified to a specific act of adultery, but whose character for truth has been impeached.

INDICTMENT for adultery committed with one Cynthia Blood, in January, 1830. At the trial in the common pleas, one

Jonathan Snow testified to having seen the said Cynthia in bed with the defendant one evening in February, 1830. Witnesses were called to impeach Snow's character for truth, and others to support it. Several witnesses were permitted to testify, against the defendant's objection, to certain instances of improper familiarity between the defendant and the said Cynthia, one about two weeks before the time spoken of by Snow, and others within a year before. The defendant excepted. Verdict for the commonwealth.

H. H. Fuller, for the exceptions, cited 1 Phil. Ev. (6th ed.) 158, 168, citing *Rex v. Cole*; 1 Chit. Cr. L., 564, 557; 1 Stark. Ev. 23, 30, 31, 32, 39; 2 Id. 366, 367, 382; 9 Petersd. 147-149, note; 2 Russ. Cr. 1513-1515; *Finnerty v. Tipper*, 2 Camp. 72; *Stuart v. Lovell*, 2 Stark. 93; 2 East P. C. 519.

Austin, attorney-general, for the commonwealth.

By Court, PUTNAM, J. Evidence should be excluded which tends only to the proof of collateral facts. It should be admitted if it has a natural tendency to establish the fact in controversy. If the evidence is irrelevant, it should be rejected for two reasons: 1. It would have a tendency to mislead the jury from the true subject of the inquiry; and, 2. No man is to be expected to go to trial prepared to prove things which are unconnected with the issue.

The issue upon this indictment was, whether or not the defendant had committed adultery with Cynthia Blood. The government offer the testimony of Jonathan Snow, to prove that this offense was committed with her in February, 1830. The particular day set forth in the indictment was immaterial; the offense might have been proved on that, or on any other day prior to the caption of the indictment. The evidence, from the nature of the offense, must generally be circumstantial. If the facts stated by Snow are true, there could be no reasonable doubt of the guilt of the defendant.

But Snow's general character for truth was impeached by the defendant, and it was supported by the government. And the court admitted evidence of other instances of improper intimacy between Cynthia Blood and the defendant, happening a short time before February, 1830, as having a tendency to corroborate the testimony of Snow in regard to the intercourse which he testified had taken place between those persons. To the admission of such evidence the defendant objected, and the question is whether it was competent.

It was argued that the defendant was not to be put upon his trial for every act of his life, but for a particular offense. Be it so; if the evidence which was received has a natural tendency to corroborate other direct evidence in the case, it would seem to be clearly admissible. In 9 Petersd. 149, note, there are some cases which illustrate this subject. Thus, in prosecutions for uttering counterfeit money, evidence that the defendant had previously uttered other counterfeits, or that he had others in his possession, is admissible. Evidence of this kind has uniformly been received as tending to show the *scienter*. So where several were indicted for a conspiracy to carry on the business of common cheats, it may be proved that similar false representations had been made by the prisoner to others who were in business, but who were not named on the record.

So upon an issue out of chancery to try a question of illegitimacy, after probable evidence of non-access, evidence may be given that the mother was of bad character. The husband and wife had lived apart, she in London, he in Staffordshire, and the plaintiff was born three years after the separation. Chief Justice Raymond allowed evidence that the mother was of bad fame, to rebut the presumption of legitimacy, and the jury found the plaintiff to be illegitimate: *Pendrell v. Pendrell*, 2 Str. 925.

In the case at bar, after hearing all the evidence concerning the general character of the witness Snow, we think the government might properly introduce the evidence which was objected to. The circumstances thus proved were such as naturally excite in the mind a belief that a woman who would so conduct herself would be more likely to commit the fact alleged against her than if her deportment had been modest and discreet.

We all think that the objections made by the counsel for the defendant can not prevail, and that the defendant must receive sentence in pursuance of the verdict.

EVIDENCE OF OTHER ACTS OF ADULTERY between the defendant and other persons not named in the bill, is not admissible in a suit for divorce: *Germond v. Germond*, 10 Am. Dec. 335.

PREVIOUS ACTS OF IMPROPER FAMILIARITY between the defendant and the person named in the indictment, but not subsequent acts, are held admissible in trials for adultery, on the authority of the principal case, in *Commonwealth v. Lahey*, 14 Gray, 92; *Commonwealth v. Pierce*, 11 Id. 450; *Commonwealth v. Durfee*, 100 Mass. 149. But where such acts of familiarity amounted to adultery they were held inadmissible in *Commonwealth v. Thrasher*, 11 Gray, 452. This distinction, as well as that between prior and subsequent acts, was disapproved in *Thayer v. Thayer*, 101 Mass. 111, 112, where, in a suit for

divorce on the ground of adultery, it was held, citing the principal case, that evidence of subsequent acts of adultery with the person named in the bill, committed outside the commonwealth, was admissible to show the nature of their relations at the time charged. Colt, J., delivering the opinion, said that the evidence should be admitted as tending to show that there existed between the parties an adulterous disposition. This disposition, said he, "is commonly of gradual development; it must have some duration, and does not suddenly subside. Whence, once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence, at any particular point of time, from facts illustrating the preceding or subsequent relations of the parties. The rule is, that a condition once proved is presumed to have been produced by causes operating in the usual way, and to have continuance until the contrary be shown."

In *Beers v. Jackman*, 103 Mass. 194, it was held, citing the principal case, that on a trial under the bastardy act, a letter from the defendant to the complainant, written seven or eight months before the child was begotten, was admissible to show an improper intimacy between them.

EVIDENCE OF COLLATERAL FACTS, having a natural tendency to establish the facts in controversy, is held admissible generally under the principle laid down as the rule of decision in the foregoing opinion, in *Commonwealth v. Choate*, 105 Mass. 458, and *Commonwealth v. Tuckerman*, 10 Gray, 200. But in *Gahagan v. Boston etc. R. R. Co.*, 1 Allen, 189, it is said that this principle is applicable only where the collateral facts are to be regarded mainly as the preparation or commencement of the principal fact sought to be proved, and, therefore, that in an action against a railroad company for an injury caused by negligence, evidence of other instances of negligence at other times was inadmissible. The principal case is cited also in *Commonwealth v. McCarthy*, 119 Mass. 355.

BURSLEY v. HAMILTON.

[15 PICKERING, 40.]

RECEIPTOR FOR PROPERTY ATTACHED, BY HIS RECEIPT ADMITS that it was attached as the property of another person; and he is, therefore, in a suit brought to enforce his promise to return such property, precluded from setting up property in himself by way of defense.

RELINQUISHMENT BY OFFICER OF HIS RIGHT to the possession of property attached by him, is a good consideration for a promise to return the same, even when the promise is made by the owner of such property.

RECEIPTOR MAY, AFTER COMPLYING WITH HIS PROMISE to return the property receipted for, bring replevin, trespass, or trover to try his right of property; and will not, in such action, be estopped by his receipt from proving title in himself.

THIRD PERSON WHOSE PROPERTY IS ATTACHED IS NOT BOUND to sue the officer immediately, but may wait until the property is taken in execution.

EVIDENCE OF PROPERTY IN THE DEFENDANT IS ADMISSIBLE upon the question of damages, in a suit on his promise to return the property; and if

such evidence shows that the property could not have been applied to satisfy the creditor's execution, the plaintiff can recover nominal damages only.

ASSUMPSIT upon a receipt given by the defendant to the plaintiff, a deputy sheriff, for certain goods attached by the plaintiff as the property of one Nye, at the suit of one Averell, which goods the defendant promised to deliver to the plaintiff on demand. On the back of this receipt was an indorsement, signed by the plaintiff, in which he promised that in case the within receipt was not in the proper form he would exchange it for another which should be considered, by certain counselors named, to be correct for both parties. At the trial it was admitted that a demand for the goods was duly made on the defendant. The defendant proved that the goods mentioned in the receipt were his at the time when the receipt was given, and were then claimed by him as such. It was admitted that neither of the parties ever applied to the counselors above named for any alteration of the receipt, or gave notice that any alteration was desired. The questions of law arising on the facts, or on such of them as were properly admitted in evidence, were reserved for the opinion of the court.

Warren, for the plaintiff, contended that the defendant was estopped by the receipt to claim the property as his own; that the parol evidence was inadmissible, because it would destroy the effect of the written promise: 3 Stark. Ev. 1007; *Clark v. McMillan*, 2 Car. Law Repos. 65; *Thompson v. Kelcham*, 8 Johns. 146 [5 Am. Dec. 332]; *Campbell v. Hodgson*, 1 Gow, 74; *Moies v. Bird*, 11 Mass. 436 [6 Am. Dec. 179]; *Hunt v. Adams*, 7 Id. 518; *Stackpole v. Arnold*, 11 Id. 27 [6 Am. Dec. 150]; *Lewis v. Thatcher*, 15 Id. 431; *Brigham v. Rogers*, 17 Id. 571; *Hoare v. Graham*, 3 Camp. 57; *Free v. Hawkins*, 8 Taunt. 92; *Moseley v. Hanford*, 10 Barn. & Cress. 729; *Woodbridge v. Spooner*, 3 Barn. & Ald. 233; *Rawson v. Walker*, 1 Stark. 361; *Powell v. Edmunds*, 12 East, 6.

Reed and Marston, for the defendant, contended that it would be competent for the plaintiff, in an action against him by the creditor, to show that the goods attached by him were not the property of the debtor: *Fuller v. Holden*, 4 Mass. 498; *Tyler v. Ulmer*, 12 Id. 163; that the receiptor was not estopped to show that the goods did not belong to the debtor: *Learned v. Bryant*, 13 Mass. 224; that the promise of the defendant was without consideration, because the goods being his own, he could derive

no advantage from being the bailee of his own goods, and the plaintiff could sustain no damage: 1 Selw. N. P. (Wheaton ed.) 36; *Frisbee v. Hoffnagle*, 11 Johns. 50; that, the whole contract not having been reduced to writing, parol evidence was admissible to supply the omissions: *Barker v. Prentiss*, 6 Mass. 434; that nominal damages only were recoverable: *Fuller v. Holden*, 4 Mass. 498; *Nye v. Smith*, 11 Id. 188; *Shackford v. Goodwin*, 13 Id. 186; *Brooks v. Hoyt*, 6 Pick. 468; *Phillips v. Bridge*, 11 Id. 242.

By Court, SHAW, C. J. By the defendant's receipt he has admitted that this property was attached as the property of another person, and has promised to return it. In an action to enforce the promise, he is precluded by such admission from alleging property in himself by way of defense. The parties, as if doubtful whether the receipt was written in such form as to secure their mutual rights, stipulated, that if on application to certain counselors named, it should not be found to be given in such form as the parties intended, it should be exchanged for one drawn in such form as they should think proper. But it is conceded that neither of the parties ever applied to either of the professional gentlemen named for any alteration of the receipt, or gave notice that any alteration was desired. The question therefore must be decided on the contract as it stands. In regard to the construction of the contract, the court are of opinion that the parol evidence was inadmissible, so far as it was intended or would have the effect to vary, alter, or control the written contract, and to engraft a defeasance or condition upon a contract absolute and unconditional.

It was contended that this promise was without consideration, inasmuch as the goods receipted for were the defendant's own property, and he could derive no advantage from becoming the bailee of his own property. But this argument can not be sustained; the attachment gave a lien and special property to the officer, with a right of possession, and the relinquishment of this right was a good consideration for such a promise. The defendant, therefore, is liable to this action.

But if the promise had been complied with, had the defendant delivered over the goods agreeably to his contract, he might then have brought his action of replevin, trespass, or trover, to try his right of property. He would no longer be estopped by his contract, and the implied admission contained in it, and upon proving title in himself, as he has proved it in the present action, he would have recovered the goods or their value.

Johns v. Church, 12 Pick. 557 [23 Am. Dec. 651]. The receptor, under such circumstances, although he may intend ultimately to assert his right of property, may well wait in the expectation that the attaching creditor will fail in his action; in which case the property will be delivered up, and all litigated questions of title avoided. It follows, of course, that had it been delivered up, according to the defendant's engagement, neither the plaintiff nor the creditor would have derived any benefit from it: *Fuller v. Holden*, 4 Mass. 498; *Tyler v. Ulmer*, 12 Id. 163; *Learned v. Bryant*, 13 Id. 224.

The court are therefore of opinion, that although the evidence offered by the defendant, of property in himself, did not constitute a defense to the action, yet it was admissible upon the question of damages, and tended to show that the plaintiff was entitled to nominal damages only. It was urged, that by thus lying by, the defendant encouraged the plaintiff to proceed in his original suit, and incur expense, in the belief that his judgment would be secured by the property attached, which he might not have done, but for such belief. But precisely the same argument would apply in all cases where a third person claims title to property attached. He is not bound to sue the officer immediately, but may, if he choose, postpone his suit till the goods are taken in execution. Such delay will not affect the owner's right to recover, nor his claim to damages.

Nor did the admission of this evidence on the assessment of damages, operate injuriously to the plaintiff, or the creditors whom he represents, by letting in the testimony of the debtor; because the same evidence would have been competent in any action brought to try the question of property, either by the creditors against the officer for not applying the property to satisfy their debts, or by the present plaintiff against another receptor, or against the officer. In either of these cases the interest of the debtor would have been in the question, and not in the event of the cause. We are of opinion, therefore, that the evidence was admissible upon the question of damages; and it showing that the property could not have been applied to satisfy the creditor's execution, the plaintiff can recover nominal damages only.

RECEPTOR FOR ATTACHED PROPERTY, WHEN MAY SHOW THAT IT WAS NOT THE DEFENDANT'S, OR NOT SUBJECT TO ATTACHMENT.—It is difficult to reconcile the decisions on the question of a receptor's right to exonerate himself from liability, by showing that the property which was attached and for

which he receipted, was not the property of the defendant, or that it was not, at the time, subject to attachment: *Freem. on Ex.*, sec. 265. In New York, the courts have uniformly held that the receptor is estopped from setting up as a defense that the property belonged to himself or to any other stranger to the writ: *Freem. on Ex.*, sec. 265; *Cornell v. Dukin*, 38 N. Y. 253; *People v. Reeder*, 25 Id. 302; *Burrall v. Acker*, 23 Wend. 606; *Dezell v. Odell*, 3 Hill, 215. Denio, C. J., in delivering the opinion of the court in *People v. Reeder*, 25 N. Y. 303, said: "No point is better settled than that a party giving a receipt for property seized by an officer, upon an execution or an attachment, is estopped from setting up against the officer that the property is his own." And in *Cornell v. Dukin*, 38 N. Y. 256, Dwight, J., delivering the opinion of the court, said: "The case of the appellant rests, therefore, upon his offers of evidence which were refused by the court. And first, on his offer to show that the property receipted for was not the property of the execution debtor, but that of the witness Cure, in whose possession it was found; and that the sheriff was informed of the fact when the levy was made. In refusing to admit evidence of these facts, the court was certainly sustained by the amplest authority." In other states, however, in which the custom of receipting for property exists, the receptor is not, in all cases, estopped from showing that the property attached was his own, or that he had delivered it to a stranger to the writ, who was the true owner. The cases in which the receptor is estopped are:

1. Where a receipt is given to avoid an actual attachment, and the debtor procures a third person to give security to the officer directed to make an attachment generally, and such person gives an accountable receipt for various articles of personal property, without reference to the question whether the same are attachable, or even in existence, or not. In such cases it has been held that the receptor assumes the absolute liability therefor, and that he is estopped from setting up as a defense that the articles were not the property of the debtor, or that they were articles exempt from attachment: *Thayer v. Hunt*, 2 Allen, 449; *Lewis v. Webber*, 116 Mass. 450. In considering this class of receipts, Colt, J., delivering the opinion of the court in the latter case, said: "Such a contract is a mere substitute for the security by attachment, and is in effect but an agreement to indemnify the officer for not making an attachment. In such case the receptor assumes the absolute liability, and would be estopped to set up that the articles were not the property of the debtor."

2. Where the goods of a debtor are actually attached as his property, and the receptor, in his receipt, expressly admits that the goods are the property of such debtor, and promises to return them to the attaching officer, or pay the amount of the judgment recovered against the debtor. In an action on such a receipt, the defendant will not be permitted to give evidence to show that the goods were not the property of the debtor, or that they were not attachable: *Bacon v. Daniels*, 116 Mass. 474; *Penobscot Boom Corp. v. Wilkins*, 27 Me. 345.

3. Where the receptor is himself the owner, and has stood by and suffered his goods to be attached, and given a receipt for them without interposing any claim. In such case he will be estopped from afterwards claiming such goods as his property, particularly if the plaintiff in the action in which the attachment issued had property which the officer could and would have attached had the receptor asserted his claim to the property at the time of the attachment: *Dewey v. Field*, 4 Metc. 381; *Sawyer v. Mason*, 19 Me. 49. It also seems that the receptor is estopped from setting up as a defense to an action on his receipt, that the property was not attachable in a case where it is ap

parent that the attaching officer is still liable, either to the plaintiff to hold and sell it in satisfaction of his judgment, or to the defendant for a return of it to him: *Smith v. Cudworth*, 24 Pick. 196; *Drake on Attach.* sec. 381.

In delivering the opinion of the court in *Smith v. Cudworth*, *supra*, Morton, J., said: "The plaintiff, who is a deputy sheriff, having attached a common bench of a cabinetmaker, delivered it to the defendant at his request, and upon his giving a written acknowledgment of its receipt, and a promise to redeliver it on demand. Upon what grounds can the defendant be absolved from the obligation of this contract? He has no right to object to the attachment. His undertaking did not depend on the legality of that, or the success of the action on which it was attached. *Non constat* that the owner of the bench would resist the attachment. If the bench was attachable, the officer was bound to hold and sell it in satisfaction of the judgment which was recovered. If it was not, or if no judgment was recovered, he was liable to the owner. And in either event he was clearly entitled to a return of the bench." It seems, however, that a recital in the receipt that the property was seized as the property of the defendant, will not estop the receiptor from showing that it was not his property: *Dayton v. Merritt*, 33 Conn. 184.

But in the case of an ordinary receipt, given where property has been attached by an officer, and in which the receiptor merely promises to redeliver it on demand, it seems to be held in all the states, except New York, that the receiptor is not estopped from showing that the property was his own, or that he had delivered it to a stranger to the writ, who was the true owner of it. And if he succeeds in showing that the property belongs to himself, or that he has returned it to its real owner, he will be relieved from further liability on such receipt: *Penobscot Boom Corp. v. Wilkins*, 27 Me. 345; *Learned v. Bryant*, 13 Mass. 224; *Fisher v. Bartlett*, 8 Greenl. 122 [22 Am. Dec. 225]; *Johns v. Church*, 12 Pick. 557 [23 Am. Dec. 651]; *Barron v. Cobleigh*, 11 N. H. 557; *Dayton v. Merritt*, 33 Conn. 184; *Parks v. Sheldon*, 36 Id. 466; *Burt v. Perkins*, 9 Gray, 317; *Lathrop v. Cook*, 14 Me. 414; *Torrey v. Otis*, 67 Id. 573; *Freeman on Executions*, sec. 265. In the case of *Lewis v. Webber*, 116 Mass. 450, Colt, J., delivering the opinion of the court, said: "The question of the defendants' liability is to be settled by ascertaining from the terms of the contract, as applied to the circumstances under which it was executed, whether it is to be regarded as a contract of indemnity only, or as a receipt for specific articles actually attached, with an agreement for their safe keeping and return. If it be the latter, then by repeated decisions the defendants are not estopped from showing in defense that the goods attached were all subject to prior mortgages, or to the prior right of the partnership creditors, and were or ought to have been applied to the payment of those debts. It was early held that if an officer had wrongfully attached the goods of a third person as the property of the debtor, and had bailed them, the bailee might protect himself by a delivery to the true owner, for by such delivery the officer would be discharged from liability to the creditor, the debtor, and the real owner: *Learned v. Bryant*, 13 Mass. 224. And it is even held that the receiptor is not in all cases estopped to assert his own right of property in the goods attached, merely by reason of having executed an accountable receipt for it to the officer. To have that effect, there must be the element of such conduct or such declarations as induced the officer to alter his condition or to forego some advantage which he might have had."

So in *Thayer v. Hunt*, 2 Allen, 449, Dewey, J., delivering the opinion of the court, said: "We think the present case must be treated as one where the officer was about to attach and remove the specific property named in the

receipt, and the receptor assumed the liability that would exist in the ordinary case of an actual attachment. Hence, if any one of these articles were not attachable in the suit against the debtor, either because they were the property of a third person, or were by law exempt from attachment, and would be wrongfully kept by him as regards the owner, the receptor may show that the property has gone to the possession or use of the person entitled to the same, in excuse for not performing his promise to deliver the same to the attaching officer." And in *Fowler v. Bishop*, 31 Conn. 562, Butler, J., delivering the opinion, said: "Officers' receipts are usually absolute and unconditional in terms, and conclusive in respect to their recitals and admissions, but are nevertheless, by operation of law, contingent. The officer has no personal interest in the property or in the possession of it; he holds it as an officer of the law, and as bailee for the purposes of law. His right to resume the possession of it, and enforce the promises of the receipt, rests on his liability to the creditor during the existence of the lien, and to the debtor or owner when that lien is dissolved. And when his liability to the creditor ceases by reason of a dissolution of the lien, and he is not liable over to the debtor or owner, because no property was in fact attached, or because, if attached, it was not removed, or if attached and removed, was immediately restored to the debtor or owner, the receipt becomes *functus officio*, and inoperative; and it is open to the receptor at all times to show, by any proper evidence, that the instrument has thus become inoperative." In *Harmon v. Moore*, 59 Me. 428, the officer had attached a team and mail wagon while they were actually engaged in carrying the United States mail. The defendant gave a receipt, in which he promised to return the team and wagon, or pay to the officer one hundred dollars. In an action on this receipt, Appleton, C. J., delivering the opinion of the court, said: "The attachment being illegal, the officer is not liable to the creditor. As the liability of the receptor is only co-extensive with that of the officer, and as the officer is not liable, the receptor must be discharged."

DELIVERY BONDS.—Instead of the receipts above referred to, bonds, denominated delivery, forthcoming, or replevy bonds, are given in several states of the Union. These bonds are usually conditioned for the delivery of the property to the officer, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. Sometimes the condition is in the alternative, either to return the property or to satisfy the judgment that may be recovered in the action: *Drake on Attach.*, sec. 327. In an action on a bond of this kind, the obligors can not question the validity of the officer's levy of attachment, nor show that the property was not attachable: *Scanlan v. O'Brien*, 21 Minn. 434; *Drake on Attach.*, sec. 339. "Nor is it competent for them to aver that the property attached was not the defendant's, but belonged to a third person, who took it into possession, whereby they were prevented from having it forthcoming to answer the judgment of the court. They are estopped by the bond from contesting the defendant's right to the property. They undertake to have it forthcoming, and it is their duty to comply with their obligation, and leave it to the plaintiff in the attachment and the claimant of the property to litigate their rights; not to take it out of the possession of the plaintiff, and put it into that of an adverse claimant, and thus excuse themselves for a breach of their contract." *Drake on Attach.*, sec. 339; *Sartin v. Weir*, 3 Stew. & P.; 421; *Gray v. MacLean*, 17 Ill. 404; *Dorr v. Clark*, 7 Mich. 310; *Easton v. Goodwin*, 22 Minn. 426; *Dehler v. Held*, 50 Ill. 491; *Braley v. Clark*, 22 Ala. 361.

In Kentucky, an owner of property, who gives a bond to secure its release

from attachment, is not thereby estopped from showing, on an application to the court for that purpose, that the property belonged to himself: *Schwein v. Sims*, 2 Metc. 209; *Halbert v. McCulloch*, 3 Id. 456. But if, after giving such bond, he fails to assert his claim until after judgment is rendered, he can not set up as a defense to a suit on the bond, that the property was not subject to the attachment: *Miller v. Deshu*, 3 Bush, 212.

In Iowa, the code provides that in an action on such a bond, "it shall be a sufficient defense that the property, for the delivery of which the bond was given, did not, at the time of the levy, belong to the defendant against whom the attachment was issued." But in *Blatchley v. Adair*, 5 Iowa, 545, it was held that a plea which did not aver who was the true owner, was bad on demurrer.

HARVEY v. TOBEY.

[15 PICKERING, 99.]

STATUTE OF LIMITATIONS, AFTER IT HAS BEGUN TO RUN, IS NOT SUSPENDED by any of the disabilities, and therefore, in the case of a note, its operation is not suspended because, after it attached, the payee covenanted with the maker, in consideration of an assignment by the latter to his creditors, including the payee, to acquit and discharge him from all claim or demand, action or right of action, for the space of seven years.

ASSUMPSIT on two promissory notes made by Samuel Tobey & Son, of which firm the defendant was a member, and payable to the plaintiff or his order. Both notes were payable on demand, and on each were several indorsements acknowledging part payment. The last indorsement on the first note was dated November 22, 1825; the last indorsement on the second note was dated December 31, 1823. The writ was dated February 22, 1833. The defendant pleaded the general issue, which was joined; *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*. The plaintiff replied a new promise within six years, and that the action accrued within six years. Issue was also joined on these replications.

Samuel Tobey died before the commencement of this action. In support of the replications, the plaintiff proved that in December, 1822, Tobey & Son executed an assignment of all their property to trustees for the benefit of such of their creditors as should become parties to the indenture, to be equally divided among them. The plaintiff was one of the creditors who executed the indenture. The indenture contained this clause: "And the said creditors, on their part, covenant and hereby agree with the said Samuel and Apollos to acquit and discharge them from all claim or demand, action or right of action, for the space of seven years, upon receiving from said assignees

their respective proportions of said moneys as aforesaid." The last indorsements on the notes were made on account of payments made by one of the trustees. If these facts were sufficient to take the case out of the statute of limitations, the defendant was to be defaulted; if otherwise, the plaintiff was to become nonsuit.

Mann and Williams, for the plaintiff, contended that the statute proceeds upon the presumption that the debt has been paid, but that the evidence of such payment has been lost: *Baxter v. Penniman*, 8 Mass. 133; *Leaper v. Tatton*, 16 East, 420; *Yea v. Fouraker*, 2 Burr. 1099; *Thornton v. Illingworth*, 2 Barn. & Cress. 824; 12 Petersd. Abr. 344; *Mountstephen v. Brooke*, 3 Barn. & Ald. 141; that whatever rebuts the presumption of payment takes the case out of the statute: *Whitney v. Bigelow*, 4 Pick. 112; *Calling v. Skoulding*, 6 T. R. 189; *Union Bank v. Knapp*, 3 Pick. 96 [15 Am. Dec. 181]; *Hinsdale v. Larned*, 16 Mass. 65; *Homer v. Fish*, 1 Pick. 435 [11 Am. Dec. 218].

Coffin, for the defendant.

By COURT. The court are of opinion that the facts shown do not support the replication, either of a new promise, or of a cause of action accrued within six years before the commencement of the suit. It is very possible that this result may be inconsistent with the expectations of the parties, when they entered into the contract of assignment; but we think it is a necessary result, from the application of well-known rules of law. The uniform construction of the statute of limitations has been that where it has once attached, and commenced running, it shall continue, notwithstanding the intervention of any of the disabilities. The only ground on which the plaintiff relies is, that after these notes had been some time due; and of course after the statute of limitations had attached, the plaintiff, with other creditors, in consideration of an assignment of property, covenanted with the defendant to acquit and discharge him from all claim or demand, action, or right of action, for the space of seven years. Whatever else may have been the construction of this covenant, we think it did not suspend the operation of the statute. This stipulation was general, and applied to all creditors, and might have an effectual operation, without being held to defeat all rights of action. To specialty creditors, to the holders of attested notes, to creditors having other collateral security, it would present no bar. What would have been the operation of this covenant or re-

lease, had the plaintiff commenced this action within the seven years, we are not called upon to decide, and it might present a difficult question. No such action was commenced, and no acknowledgment or new promise was required within the six years. If it could legally operate according to its terms as an acquittance and release of all right of action for seven years, and the plaintiff had no collateral security or other remedy than a right of action as a simple contract creditor, then it was a bar to all right of action, or other remedy, than that afforded by the assignment itself. The case is quite distinguishable from that of *Mountstephen v. Brooke*, 3 Barn. & Ald. 141, cited in the argument. There a deed was executed within six years before the commencement of the suit, to which the defendants were parties, containing a recital of the continued existence of the debt. And it has often been held that an unqualified acknowledgment of the present existence of the debt, though made to a stranger, and not to the creditor, is a fact from which the law will infer a new promise. We think the evidence stated does not take the case out of the statute of limitations.

Plaintiff nonsuit.

STATUTE OF LIMITATIONS NOT SUSPENDED BY SUBSEQUENT DISABILITY.—See note to *Ruff's Adm'r v. Bull*, 16 Am. Dec. 692, where the other cases on this subject, contained in this series, are collected.

SMITH v. SHEPARD.

[15 PICKERING, 147.]

EVICION OF TENANT BY PARAMOUNT TITLE IS A GOOD DEFENSE in an action of covenant for rent.

OPEN AND PEACEABLE ENTRY BY MORTGAGEE, in presence of two witnesses, for the purpose of foreclosure, after condition broken, gives him a lawful possession, and operates as an ouster of the lessee of the mortgagor.

THREAT BY MORTGAGEE IN ACTUAL POSSESSION to expel the lessee of the mortgagor, unless he agree to pay the rent to him in future, amounts to a complete eviction of such lessee.

RENT PAYABLE IN ADVANCE ON A CERTAIN DAY may be paid at any time during that day, and if the tenant is, on that day, evicted under a title paramount, he is not bound to pay such rent.

COVENANT for the non-payment of rent of certain real estate. It appeared by an agreed statement of facts that in 1825 the plaintiff mortgaged the premises to one Howe. In 1830, the plaintiff, who was then in possession, leased them to the defendant for a term of five years, at an annual rent, payable

quarterly in advance. The plaintiff, in the lease, covenanted to warrant and defend the premises against the lawful claims of all persons, and the defendant covenanted to pay the rent. The defendant paid the rent in advance until July 1, 1833, when, the time limited for the payment of the sum secured by the mortgage having expired, and payment not having been made, Howe entered on the premises in the presence of two witnesses, for breach of the conditions of the mortgage, and for the purpose of foreclosure, but without giving notice to the plaintiff, and threatened to expel the defendant unless he promised to pay the rent to him in future. Thereupon the defendant did promise to pay the rent to Howe, and on the same day paid to him the quarter's rent in advance, for which this action is brought. Howe agreed to indemnify the defendant, who remained in possession against the plaintiff's claim for rent. If the court should be of opinion that the plaintiff was entitled to recover, the defendant was to be defaulted; otherwise the plaintiff was to become nonsuit.

Metcalf, for the plaintiff, contended that there must be an actual ouster or eviction to discharge the tenant from his obligation to pay rent: *Harrison's case*, Clay. 34; 1 Wms. Saund. 204, note 2; *Pendleton v. Dyett*, 4 Cow. 581. That a right to oust or a threat to oust does not amount to an eviction: *Bac. Abr.*, Rent, L; *Hannam v. Woodford*, Skin. 300. That Howe had no claim on the defendant previously to July 1, 1833, because there was no privity of contract between them. He might have treated him as a trespasser, but he could not distrain for rent: *Fitchburg Cotton Manuf. Corp. v. Melven*, 15 Mass. 270; *McKircher v. Hawley*, 16 Johns. 289; *Souders v. Vansickle*, 3 Halst. 313. That if the defendant had assigned this lease to a stranger, or to Howe himself, he would still be liable to the plaintiff for the rent: *Thursby v. Plant*, 1 Wms. Saund. 241, note (5); *Boulton v. Canon*, 1 Freem. 337; *Brett v. Cumberland*, Cro. Jac. 522; *Mills v. Auriol*, 1 H. Bl. 433; *Auriol v. Mills*, 4 T. R. 94. That the defendant could not set up Howe's title against the plaintiff, because he held under the lease from the plaintiff, notwithstanding the parol agreement with Howe: *Doe v. Pegge*, 1 T. R. 758, note; *Hayne v. Mallby*, 3 Id. 441, 442. That as the lease was made after the mortgage, the defendant and the mortgagee were strangers, and the attornment was of no avail; *Souders v. Vansickle*, 3 Halst. 316; *Alchorne v. Gomme*, 2 Bing. 54; Co. Lit. 309, a.

Richardson, for the defendant, cited *Reed v. Davis*, 4 Pick. 216; *Fitchburg Cotton Manuf. Corp. v. Melven*, 15 Mass. 268.

By Court, SHAW, C. J. To an action of covenant for rent, eviction of the tenant by a paramount title is a good defense: *Bac. Abr.*, Rent, L; *Hunt v. Cope*, Cowp. 242. The facts agreed to show, that the defendant was ousted by title paramount. Howe, the mortgagee, claiming under a mortgage made by the plaintiff long prior to the lease from the plaintiff to the defendant, made an open and peaceable entry upon the premises in presence of two witnesses, after condition broken, for the purpose of foreclosure, as he lawfully might, and this, by force of the statute of this commonwealth, gave him a lawful possession, and operated as an ouster of the tenant. To render such entry lawful and effectual, notice to the mortgagor is not necessary: *Reed v. Davis*, 4 Pick. 216. The mortgagee, having thus the lawful and the actual possession, and the right to expel the lessee, threatened to do so unless he would enter into a new contract. This was equivalent to an actual and complete eviction. Such an entry and eviction by a mortgagee has been decided to be a good defense to a claim for rent in an action of covenant: *Fitchburg Cotton Manf. Corp. v. Melven*, 15 Mass. 268.

As to the quarter's rent due by covenant in advance, the defendant had the whole day to make the payment in advance. But during the day, the mortgagee entered and ousted him, and this was a good excuse. The enjoyment of the land is the consideration for the payment of rent, and when the prospective enjoyment of the estate was taken away, the obligation to make the prospective payment ceased.

Plaintiff nonsuit.

EVICTIO, WHAT IS.—In order to constitute an eviction, it is sufficient if the paramount title is so asserted that the grantee or lessee must yield to it or go out. See note to *Ferriss v. Harshea*, 17 Am. Dec. 788, and note to *Cummins v. Kennedy*, 14 Id. 53. In *Stone v. Patterson*, 19 Pick. 478, and in *Morse v. Goddard*, 13 Metc. 180, it was held, citing the principal case, that a lawful entry of a mortgagee, and a threat to turn out the tenant of the mortgagor, unless he promised to pay rent to such mortgagee, amounted to an actual and complete ouster or eviction. The principal case was also cited in *Welch v. Adams*, 1 Metc. 496, and in *Knowles v. Maynard*, 13 Id. 355, to the point, that in case of such entry and threat, the tenant is justified in paying rent to the mortgagee, and is no longer liable to the mortgagor. In *Magill v. Hinesdale*, 16 Am. Dec. 70, it was decided that a tenant of a mortgagor might attorn to the mortgagee, after the mortgage had become forfeited.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CLENDENNEN v. PAULSEL.

[3 MISSOURI, 230.]

ASSUMPSIT WILL NOT LIE TO RECOVER FOR THE AMOUNT OF WORK done under a covenant which one party thereto has prevented the other from fulfilling; the action must, in such a case, be brought upon the covenant.

ERROR to the circuit court of Cole county. The opinion states the case.

Hayden and Scott, for the plaintiff in error.

Wells and Leonard, for the defendant in error.

By Court, **McGILL, C. J.** This was an action of assumpsit brought by Clendennen, the plaintiff, against the defendant, for work and labor. The defendant pleaded non-assumpsit. Paulsel, the defendant, had judgment. It appears by the record that the plaintiff and his brother Daniel entered into a covenant to build a house of a certain description for Paulsel, at a price mentioned in the covenant. Paulsel covenanted to pay the price agreed on for the work when the same was done. After the covenant was made, Daniel Clendennen refused to have anything more to do with the business, and gave the same entirely up to John. He then went on under the covenant and performed a considerable part of the work under the covenant, when Paulsel refused to let him proceed any farther. He desisted, and brought his action of assumpsit alone for the work done.

The plaintiff moved the court to instruct, etc., that if the plaintiff could recover at all, it must be on the covenant; and that he could not recover in this form of action for work done under the covenant; which instruction the court gave. This

opinion of the court is assigned for error. It is insisted by Messrs. Hayden and Scott, for the plaintiff in error, that where a contract is put an end to by the party, the other party may consider the whole contract as rescinded, and go for the work as if no special contract or covenant existed. The first case cited to support this position is *Weaver v. Bentley*, 1 Cai. 47. This was a case of a covenant on the part of Bentley to deliver to Weaver a lease of a lot of ground by a certain day, and in default thereof, two notes on Weaver were to be paid. Weaver on his part did not sign the covenant, nor does it appear by the covenant what Weaver gave as consideration thereof. Bentley failed to deliver the lease. Weaver paid several sums of money as a part of the consideration, then brought his action of assumpsit to recover the money back. The majority of the court held that the plaintiff had his election either to affirm the contract or go on the covenant, or to disaffirm the contract and recover back the money which he had paid. Livingston, Justice, dissented. His ground of dissent is, that as the plaintiff had his remedy on the covenant, he must resort to that alone. It is our opinion that Livingston was right, and the court was wrong. The authorities and cases cited by Messrs. Wells and Leonard for the defendant, will, in our opinion, show what the true law is. The first authority is 1 Chit. Pl. 91, which says, where the party has a higher security, he must found his action thereon. In page 92 he says, assumpsit will not lie where there has been an express contract under seal. But he says it would lie if the deed were signed by the plaintiff only. That rule applied to this case would be, that if Paulsel, in this case, had not signed the covenant, then Clendennen, after having performed the covenant, or having been prevented, must bring his action of assumpsit.

There are many other cases given where a deed may have been concerned between the parties, and assumpsit will lie; but the case at bar does not come up to any of them. The next authority cited is that of *Young v. Preston*, 4 Cranch, 239, cited in Condensed Reports, 98. This was an action of assumpsit for work and labor. It appeared in evidence that the plaintiff had done the work under a sealed instrument, and had been prevented by the defendant from doing the balance.

The supreme court of the United States held, that as the plaintiff had a clear right of action under the covenant, he must resort thereto. 3 Stark. 1762, is to the same point, where it is said that when the parties have made an express contract,

none can be implied. We consider the rule as laid down in the case of *Young v. Preston* is the true one. Many other authorities have been cited to the same point. We are willing to admit that it has been held in some cases, as cited by the plaintiff's counsel, that where the party has covenanted to do an act and has failed, the covenantee has been allowed to recover the money paid in assumpsit. But if any of these cases establish the doctrine that the party can sue in assumpsit where he has a security of a higher nature, on which he can sue, we have no hesitation in saying the cases are not law. 1 Powell on Contracts, 417, is cited by the plaintiff, where it is laid down that if he who is to be benefited by another's fulfilling a contract, is the occasion why it is not fulfilled, the contract is thereby entirely dissolved, and the party bound is discharged from his obligation. This rule applies to this case in this way, that if Paulsel prevented the plaintiff from fulfilling his covenant, then he may sue on the covenant, and allege the prevention, and will be entitled to his money as if he had performed the covenant. It can not mean that the matter is to be considered as if the sealed instrument never had been made. According to this view of the subject, the judgment of the circuit court is affirmed with costs.

Cited in *Helm v. Wilson*, 4 Mo. 43, to the point that where there is a special agreement, and the plaintiff is prevented from doing the work, he may recover the worth of the labor at least, or he may recover for the whole, as if performed; in *Porter v. Rea*, 6 Id. 30, to the point that where there is a special contract the plaintiff must declare on it, and if it has not been performed he may allege prevention by the defendant as an excuse; in *Jarrell v. Farris*, Id. 160, to the point that, when the covenantee does any act of forcible prevention, the covenantor is released from the performance of his contract; in *Little v. Mercer*, 9 Id. 220, to the point that the plaintiff must declare on the contract, and may recover as if he had fully performed; in *Crump v. Mead*, 3 Id. 234, in *Garred v. Doniphan*, 10 Id. 165, and in *Brown v. Gauss*, Id. 266, to the point that assumpsit will not lie for a stipulated price due on a contract under seal; and in *Meysenburg v. Schieper*, 43 Id. 434, to the point that he who prevents a thing from being done shall not avail himself of the non-performance which he has occasioned. In *Kennedy v. Kennedy*, 5 Am. Dec. 629, it was decided that if the obligee is the cause of the non-performance of a covenant, the obligor is thereby discharged.

DEAVER v. SAVAGE.

[3 MISSOURI, 252.]

GENERAL ASSIGNMENT TO TRUSTEE FOR BENEFIT OF CREDITORS is good and effectual without containing a schedule of the property assigned, or of the creditors provided for.

DEBTOR HAS THE RIGHT TO PREFER one creditor to another.

WRIT of error from the St. Louis circuit court. The opinion states the case.

Allen, for the plaintiff in error.

By Court, WASH, J. The plaintiff sued Keen and Page by attachment in the circuit court, and summoned the defendants as garnishees. Judgment was rendered against the defendants, Keen and Page, and one of the garnishees, and in favor of the other garnishees, the defendants in error; to reverse which, the plaintiff now prosecutes his writ of error in this court. The facts disclosed in the answer of the garnishees are, "that on the fifth of July, 1831, the defendants, Keen and Page, who had previously been partners in mercantile business, dissolved partnership on such terms that all the stock, goods, debts, and effects of the firm became the sole property of the partner Page, who took possession of the same, and carried on the business until the thirteenth of the same month, when he executed a deed of that day to John H. Gay, and John Smith and brother, conveying all his household furniture, goods, chattels, merchandise, debts, and sums of money due and owing or belonging unto him, said Page, and all securities taken and obtained for the same, of whatever kind or nature, or wheresoever the same may be found in either Missouri or Illinois; to have and hold the same in trust; to collect the debts and convert the property into money, and out of this fund to pay first the expenses of the trust, the sums due to the clerks and servants, as privileged debts, and then four thousand dollars to an indorser for Keen and Page; then to pay other securities, indorsements, and borrowed money; and next to pay moneys due on consignments and for rent of the warehouse; and the balance to pay over generally to the creditors of Keen and Page, proportionally, according to their respective claims; and the surplus, if there should be any after paying all the debts, to pay over to said Page or his representatives." A general power was contained in the deed authorizing the grantees to collect debts, etc., and to constitute and appoint one or more attorneys under them as substitutes to fulfill and execute the same duties and powers under the deed. Page put the above-named trustees, Gay, Smith and brother, into possession of all his effects. They took and kept possession of the same until the twelfth of August thereafter, when, at the request of many of the creditors provided for in said deed, and with the consent of Page, they executed a deed to the defendant garnishees, Savage and Tabor,

transferring the same goods, effects, etc., to them as trustees for the same uses and purposes. Savage and Tabor took immediate possession of the property under said deed, and were proceeding in the discharge of their duties as trustees under said deed, when the attachment was served on them. Interrogatories were submitted, in answer to which the garnishees set out in substance the facts as above stated, and deny that the effects in their hands are liable to the attachment. No issues were made up for trial. Judgment was given upon the answers of the garnishees, which were not denied, and the sole question arising on the record is, whether the deed from Page be good and valid in law. It is objected by Mr. Allen, for the plaintiff in error, that the deed is void.

First, for want of certainty in the description of the property conveyed; and,

Second, because it establishes a preference among the creditors of the grantor.

The authorities cited do not, as we think, support the position; on the contrary, the law is regarded as well settled that a debtor has a right to prefer one creditor to another: 5 T. R. 420; 8 Id. 521; 2 J. U. R. 306; 4 Id. 529. And that a general assignment without a schedule of the property conveyed, or of the creditors provided for, will be good and effectual: 7 Pet. 613.

The judgment of the circuit court is therefore affirmed, with costs.

DEBTOR MAY PREFER ONE CREDITOR TO ANOTHER.—*Buffum v. Green*, 20 Am. Dec. 562; *Mackie v. Cairns*, 15 Id. 477; *Wilkes v. Ferris*, 4 Id. 364.

The principal case is cited in *Patrick v. Keeler*, 49 Mo. 551, to the point that a general assignment of all a man's property to his creditors is not *per se* fraudulent.

DAGGETT v. SHAW.

[3 MISSOURI, 264.]

COMMON CARRIER IS RESPONSIBLE FOR ALL LOSSES, except those that are inevitable, or that arise from the act of God or of public enemies, unless he be protected by the terms of his contract.

ERROR to the St. Louis circuit court. The opinion states the case.

Allen, for the plaintiffs in error.

By Court, WASH, J. This was an action of assumpsit commenced by Shaw, the defendant in error, against the plaintiffs

in error, in the St. Louis circuit court, to recover of them (being the owners of the steamboat St. Louis), the value of three crates of earthenware shipped on board the St. Louis in good condition, etc., to be transported from New Orleans to the city of St. Louis, and there delivered in like good order and condition to the defendant in error, the dangers of the sea only excepted, etc. The material facts, as preserved in the bill of exceptions, are, "that the three crates of earthenware complained of were lost from on board the steamboat St. Louis, in the Mississippi river, on her passage from New Orleans to St. Louis; that at the time the crates were lost, they were not stowed in the hold of said steamboat, but were placed upon the lower guard under cover of the upper guard, and from that position were struck off into the river by another boat running against the St. Louis in the night; that goods stowed on the guard were more exposed to accidents than when stowed in the hold of the boat; that the loss was sustained by the running of the steamboat Courtland upon the steamboat St. Louis, in a dark, smoky night; that at the time of the injury the steamboat St. Louis was steered by a pilot as good as any upon the river; that she was under way, hugging the bar, which lay on the right hand, and running by soundings in about two fathoms of water, and as near the bar as was thought safe; that from this position a light was seen across the head of the bar, which at first was not believed by the pilot of the St. Louis to be the light of another boat; that the Courtland turned the head of the bar, when her lights disappeared, and were not seen again from the St. Louis until the boats had approached so near each other as to render it impossible to avoid a contact; that the Courtland, as if afraid of running aground, turned out obliquely from the bar, and struck the St. Louis with her bowsprit and cutwater, so as to carry away the afterpart of the wheel-house and afterguard, with the three crates and sundry stores belonging to the boat, which were stowed together on the guard, etc.; that by the uniform course of navigation on the Mississippi, steamboats ascending hug the shore, and those descending keep the stream; that in transporting goods in steamboats on the western waters, it is the universal practice to stow above hatches upon the decks and guards such goods as are not subject to be easily damaged by the weather, particularly crates and casks of earthenware, etc." Upon this state of facts the plaintiff moved the court to instruct the jury that the loss of the crates did not occur by one of the dangers

of the seas, within the exception in the bill of lading, which instruction was given. The defendants then moved the court to instruct the jury, that if they find from the evidence that the master and navigators of the defendants' boat used reasonable care and diligence with the three crates, and that the same were lost without the negligence or fault of the defendants or their servants, the defendants are not liable in this action.

2. That the fact that the three crates were stowed upon the guards of the boat, does not make the defendants liable in this action, if they would not have been liable in case the crates had been stowed in the hold of the boat, etc.; which instructions prayed for by the defendants were refused; to the giving and refusing of which said several instructions the defendants excepted. Thereupon the plaintiff in the circuit court had verdict and judgment, to reverse which, the present writ of error is prosecuted; and the defendants below, who are plaintiffs here, assign for error the giving the instruction asked by the plaintiff, and the refusal of the court to give the instructions asked by the defendants. Mr. Allen, for the plaintiffs in error, insists that the bill of lading is a contract of bailment, in the execution of which ordinary care and diligence only on the part of the bailee can be required. The authorities cited do not bear him out. A carrier, it is true, may be regarded as a bailee for hire; but he will be held in the light of an insurer, responsible for all losses but those that are deemed inevitable, or arising from the act of God, and of the king's enemies (see 1 T. R. 27, and 5 Id. 389), unless he be protected by the terms of his contract. The only exception in this case is, loss arising from the danger of the seas. And the circuit court decided very correctly, that the loss of the crates in this case did not come within the exception. The objection that it was a question for the determination of the jury, and not for the decision of the court, is not well raised. The contrary thereof is the law. Regarding it as a bailment for hire, what should be deemed reasonable care and diligence would depend upon the circumstances to be ascertained by a jury, but when ascertained, to be determined by the court. The instructions asked for by the defendants were therefore wrong, and correctly refused by the circuit court; the first presenting a question of law in the abstract, proper for the court, and the second a state of facts, from which it was the duty of the court to decide the law in the way it was decided.

The judgment of the circuit court is, therefore, affirmed with costs.

COMMON CARRIERS ARE LIABLE for all losses other than those arising from the act of God, or from public enemies. See *Stramboat Lynx v. Fisher*, 12 Mo. 264, citing the principal case; *Smyrl v. Nolon*, 23 Am. Dec. 146; *Ewart v. Street*, Id. 131; *Craig v. Childress*, 14 Id. 751; *Williams v. Grant*, 7 Id. 235; *Colt v. McMecken*, 5 Id. 200; *Schiefelin v. Harvey*, Id. 206.

MITCHELL v. THE STATE.

[3 MISSOURI, 263.]

WRIT OF ERROR LIES IN A CAPITAL CASE in this state; but a bill of exceptions will not be allowed or considered in such a case.

ERROR from the St. Louis circuit court. The opinion states the case.

Bates, for the prisoner.

Allen, for the state.

By Court, WASH, J. This was an indictment against Mitchell for murder. Verdict of guilty and judgment of death in the circuit court, to reverse which judgment the plaintiff now prosecutes his writ of error in this court. Mitchell excepted to the judgment of the circuit court on several matters arising in the progress of the trial below, tendered his bill of exceptions, and had them signed by the court; and in that way caused the matters of exception to be spread upon the record. In this state of the case a motion has been made by Mr. Allen (circuit attorney) to quash the writ of error, and two questions are presented for the consideration of this court.

1. Will a writ of error lie in a capital case? 2. Was the prisoner entitled to his bill of exceptions?

The authorities cited, 2 Tidd, 1188; 2 Salk. 504; 2 Learned, 101, lay down the law clearly as settled and administered in the English courts. It is undoubted law that in England the writ of error in cases of treason or felony will not lie without the consent of the king. It is then a matter of grace and favor. It has been held by this court, however, and may now be taken as the settled law of this land, that here the party will be entitled of right to his writ in all cases where in England he would have it with or without the consent of the crown.

It remains now to consider the effect of the writ, and whether the bill of exceptions can be allowed or considered in this case. This question has been most elaborately and ably argued by Mr. Bates, of counsel for the prisoner, and by Mr. Allen for

the state. It is not proposed to examine the arguments and authorities in detail, but merely to state the principal positions assumed, and our understanding of the law in regard to them. It is insisted that a bill of exceptions is a mere corollary or necessary incident to the writ of error, and that the writ of error being a writ of right in all cases, criminal as well as civil, in order to make it effectual the suitor must be allowed in all cases his bill of exceptions. It is answered that the writ of error removes merely the record proper. That the bill of exceptions is intended to place upon the record some matter that would not appear in the regular progress of the cause. In looking into the record proper, it may be seen if the inferior courts have jurisdiction of the subject-matter and proceed regularly to judgment. The collateral means to be employed, or steps taken in the cause, are left to the judgment of the inferior courts, and can not be reviewed or examined but upon bills of exception, by which they are placed upon the record; and it may be well intended by the legislature that the appellate court shall have power to correct such errors only of the inferior courts as may appear on the record proper of such courts. It is then insisted that the statute of Westminster 2, 13 Edw. I., which gives the bill of exceptions, is to be regarded as the law of this land in full force, and that in its terms, as well as spirit, it applies as well to criminal as civil cases. To this it is answered that in adopting the common law, and the statutes in aid thereof down to the 4th of James I., the British statutes so adopted must be taken and understood as construed by the British courts at the time of adoption, and that for five centuries and upwards it has been uniformly held in those courts that the statute above cited does not extend to cases of treason or felony. In minor criminal cases, bills of exception have been allowed *ex gratia*. The reason, justice, or policy of the construction is not now to be questioned. Such long established principles and precedents are not to be uprooted or disturbed. It is better, in such cases, to take the law as we find it, and conclude that it is founded in good reason, than to change or attempt to change it merely because we can not see the reason of it. It is again insisted that this court is required by the constitution to exercise a superintending control over the circuit court in all cases, which can not be done without the aid of bills of exception, etc.; and here it may be answered that this court must employ the means provided by the legislature, and use such as the constitution affords, where no means are provided. In legislating on the sub-

ject of bills of exception, they confine themselves expressly and carefully to civil cases. Their failure to provide for them in criminal as well as civil cases, whilst they were passing upon the subject, is to be taken as equivalent to an express denial of them. Leaving this court to exercise its superintending control over the circuit court by writ of error merely, not choosing to provide for it all the means that may be necessary in all cases.

Cited and explained in *Vaughn v. The State*, 4 Mo. 294, and held not to have decided that bills of exceptions would be allowed in minor criminal cases.

CASES
IN THE
SUPERIOR COURT
OF
NEW HAMPSHIRE.

LORD v. COLLEY.

[6 NEW HAMPSHIRE, 92.]

LIABILITY FOR RECOMMENDING THE CREDIT OF ANOTHER arises only where the recommendation was false and fraudulent.

A RECOMMENDATION IS NOT TO BE PRESUMED FRAUDULENT because it happens not to be true. The fraud is a question for the jury.

CASE for falsely representing one Hobbs, jun., to be a man of credit, whereby the plaintiff was induced to trust him, and lost a sum of money. The recommendation was as follows:

“This may certify, that Josiah Hobbs, jun., is competent to pay the sum of one hundred dollars within any reasonable term of time, and we hereby recommend him as possessing credit to that extent. Newfield, April 10, 1829. G. L. Smith, John Hobbs, John Colley.”

The plaintiff sold goods to Hobbs, jun., on the faith of this certificate, to the amount of one hundred and four dollars, taking his note therefor, part of which has been paid. Evidence was introduced by both parties, tending to show the state of Hobbs, jun.'s, property, the preponderance, however, tending to prove that he was worthless when the certificate was made.

The court instructed the jury that if Hobbs, jun., was in fact destitute of credit when the certificate was given, the plaintiff was entitled to recover. Verdict for the plaintiff.

Hobbs, for the defendant, moved for a new trial on the ground of misdirection, and relied upon *Pasley v. Freeman*, 3 T. R. 51; *Eyre v. Dunsford*, 1 East, 318; *Haycraft v. Creasy*, 2 Id. 92;

Thpps v. Lee, 8 Bos. & Pul. 367; *Bean v. Bean*, 12 Mass. 20; *Ward v. Center*, 3 Johns. 269; *Upton v. Vail*, 6 Id. 181 [5 Am. Dec. 210]; *Young v. Covell*, 8 Id. 23 [5 Am. Dec. 316]; *Russell v. Clark's Ex'rs*, 7 Cranch, 69; 2 Kent Com. 385; *Patten v. Gurney*, 17 Mass. 182 [9 Am. Dec. 141]; *Hutchinson v. Bell*, 1 Taunt. 558; *Cross v. Peters*, 1 Greenl. 376 [10 Am. Dec. 78].

Sullivan and Tebbells, contra.

By Court, RICHARDSON, C. J. The question in this case is, whether the jury were misdirected in a matter of law.

It is well settled that an action of this kind can not be sustained, unless the recommendation be both false and fraudulent. Recommendations are generally understood to be nothing more than the opinion of those who give them, resting upon common reputation and the apparent circumstances of the individual recommended, and not upon any minute examination of his affairs. And it is well known that men who are apparently in good credit, and in easy circumstances, turn out to be, in reality, insolvent. It is, therefore, very obvious that a recommendation ought not to be presumed to be fraudulent, merely because it happens not to be true. The law on this subject is explained in the cases cited by the counsel of the defendants, and in many other cases: *Ames v. Melward*, 8 Taunt. 637; *Hamar v. Alexander*, 5 Bos. & Pul. 241; *Vernon v. Keys*, 12 East, 631; *Pewtris v. Austen*, 6 Taunt. 522; 2 Stark. Ev. 467; *Fletcher v. Bowsker*, 2 Stark. N. P. C. 561; *Gallager v. Brunel*, 6 Cow. 346; *Barney v. Dewey*, 13 Johns. 224 [7 Am. Dec. 372]; *Scott v. Lara*, Peake N. P. C. 226; 7 Bing. 105; *Foster v. Charles*, 6 Id. 396.

In this case the jury were told, in substance, that if the recommendation was false, it must be presumed to be fraudulent. But it is certain that a false representation is by no means necessarily a fraud in law. If, then, the writing which was signed by the defendants in this case, is to be considered as nothing more than a common recommendation, it is clear that the question of fraud was a question of fact, to be settled by a jury, and the direction given was wrong.

We have attentively considered the writing which was given by these defendants. It is not in the common form of a letter of recommendation. With respect to the competency of Hobbs to pay one hundred dollars, it is a certificate. As to his credit, it is a recommendation. Now, a certificate is, strictly speaking, a certain assurance of that which it states. But these defend-

ants are probably common men, who are not likely to know very accurately the precise force of the word certify. It is probable that in certifying that Hobbs was competent to pay one hundred dollars, they intended nothing more than to express an opinion that he was competent. And it is probable that the certificate would, in general, be understood to express nothing more than this.

We are, on the whole, of opinion that the jury were misdirected, and there must be a new trial, in order that it may be submitted to the jury to say whether the writing, which was signed by the defendant, was fraudulent as well as false.

New trial granted.

LIABILITY FOR RECOMMENDATION FOR CREDIT.—This subject is briefly discussed in the note to *Upton v. Vail*, 5 Am. Dec. 210. The principles there laid down are in harmony with the adjudicated cases of the various states, although the decisions cited in their support are taken mostly from the New York reports. In *Pasley v. Freeman*, 3 T. R. 51, the question of one's liability for loss arising from his recommendation of another's business standing or character, was first raised. The court were not unanimous upon a proposition that seemed so novel; but the conclusion reached and followed in all the subsequent cases presenting similar features was, that for falsely representing one to be of good credit who was in fact unworthy to be trusted, a liability resulted for loss occasioned to a person who was intended to be deceived and who was deceived. The essentials of the liability were recognized to be the false assertion of a fact with intent to deceive, whereby one was deceived and damaged. There is now no departure in principle from this rule. Wherever these essentials exist, the liability attaches; although in England and in some of the states, as will be subsequently shown, statutes have framed a rule of evidence, by which the injurious representation is to be proved. But decisions have gone much farther, and have held men responsible for recommendations of others, where the circumstances differed from those presented in *Pasley v. Freeman*. A review of the cases, however, justifies the statement, that the recommendation must be false and fraudulent. One source of discussion has been as to what was meant by fraudulent. Before passing to a consideration of this question, those general propositions which have been settled in the course of judicial examinations of it will be first adverted to.

THE REPRESENTATION MUST HAVE OCCASIONED DAMAGE.—It is not sufficient to fix the liability of a defendant, that he represented to the plaintiff that a certain person was of good mercantile standing, knowing at the time that he was insolvent. If the plaintiff did not incur loss by reason of a reliance upon that false statement, he can recover nothing from the party making it. Fraud without damage furnishes no cause of action—a principle as old as 3 Bulstr. 95, and reiterated in *Taylor v. Guest*, 58 N. Y. 262; *Iasigi v. Brown*, 9 Wis. 310; S. C., 17 How. (U. S.) 183, and stated expressly or impliedly in all of those decisions where one has been held answerable for his recommendations of another's credit.

IT IS NOT ESSENTIAL THAT THE PERSON MAKING THE FALSE AFFIRMATION is to be benefited by it. Cases have arisen where the representations were

made to induce a sale to the party's judgment debtor. A very manifest benefit accrues in such instances to the one who inspired the confidence. Other circumstances can be readily imagined where a man might derive some advantage from representing another's business standing to be good. But this advantage or benefit, whatever it may be, is not the *gravamen* of the deceived party's action; it is for the injury to himself, and not for the benefit the deceiving party receives, that the action is brought, and on that ground alone can it be sustained. Therefore, to entitle one to recover for loss for selling goods to an insolvent, in reliance upon the assertions of another, it is not necessary to show that that other has derived any benefit from his false and fraudulent representation: *Haycraft v. Creasy*, 2 East, 92; *Vernon v. Keys*, 12 Id. 636; *Pasley v. Freeman*, 3 T. R. 51; *Footer v. Charles*, 6 Bing. 396; *Corbit v. Brown*, 8 Id. 433; *Polhill v. Walker*, 3 Barn. & Ald. 122; *Langridge v. Levy*, 2 Mee. & W. 519; *Russell v. Clark's Ex'rs*, 7 Cranch, 69; *Upton v. Vail*, 6 Johns. 181; S. C., 5 Am. Dec. 210; *Young v. Otis*, 8 Johns. 23; S. C., 5 Am. Dec. 316; *Allen v. Addington*, 7 Wend. 10; S. C., 11 Id. 375; *Gallagher v. Bund*, 6 Cowp. 346; *Patton v. Gurney*, 17 Mass. 182; S. C., 9 Am. Dec. 141; *Tryon v. Whitmarsh*, 1 Meto. 1; *Loddell v. Baker*, Id. 193; *Wise v. Wilcox*, 1 Day, 22; *Hart v. Talmadge*, 2 Id. 381; S. C., 2 Am. Dec. 105; *Ewings v. Calhoun*, 7 Vt. 79; *Weeks v. Burton*, Id. 67; *Young v. Hall*, 4 Ga. 100.

THE PLAINTIFF IN PARTICULAR NEED NOT BE INTENDED TO BE DEFRAUDED.—If a false representation is made, intended to give a false credit, any one who happens to be injured by it may maintain an action therefor: *Young v. Hall*, 4 Ga. 100. The case of *Addington v. Allen*, 11 Wend. 374, 383, illustrates this doctrine. A letter was written by Addington to one Wilson, of New York city, concerning one Baker, in which the following language was used: "Mr. Baker is going to your place to buy goods; he has been a merchant some years at Aurora, Erie county; he has bought his goods at Buffalo, Utica, and elsewhere heretofore; any assistance you may give him by way of buying, would be thankfully acknowledged, he being an acquaintance of mine." At the time Addington had two unsatisfied judgments against Baker, and a bond and warrant to confess judgment against him. Although the letter was artfully drawn, yet from Addington's declarations, and the surrounding circumstances, it was found by the jury that he intended to induce Wilson to hold Baker out as a merchant of fair standing, and worthy of credit, in order that he might obtain goods from New York sellers, which Addington could subject to the executions on his judgments. Baker applied to Allen's house, and referred them to Wilson, who said that he would trust Baker on Addington's recommendation. The goods were therefore sold on credit, but Baker becoming insolvent, their price could not be collected, whereupon the action against Allen was then commenced. Chancellor Walworth said: "Both reason and natural justice require that he should be held liable for the damage the plaintiff has sustained by that fraud. It is not necessary that the defendant should have had any particular individual in view as the person who was to be defrauded. * * * But where a party plans a deliberate fraud, and furnishes the means to another to carry that plan into effect upon some one of a particular class of persons, as in this case, it is idle to contend that he is not answerable for the consequences, because he did not know upon what particular individual of the class the fraud would be perpetrated." In the course of the chancellor's opinion, he expressed a doubt as to the question whether one who makes a false written recommendation of another's credit with intent to deceive some particular person, would be liable to others who have met with a loss on

the faith of such representation. It is conceived, however, that one who sets afloat a false and fraudulent instrument ought not to be relieved from responsibility, because some one other than he intended to deceive was defrauded by it. One ought to bear the loss of his fraudulent acts; and this the more in this particular connection, inasmuch as the actual intent to deceive is not a requisite to the liability.

In the earlier cases, some stress was laid upon the fact that the representation was made with a fraudulent intent, that the fraudulent assertion of a fact, or fraudulent concealment of a fact, concerning another's credit, was made with a view to deceive some one. Such were *Pasley v. Freeman*; *Isaacs v. Brown*, 17 How. (U. S.) 183; *Lord v. Goddard*, 13 Id. 198, where it is said that the simple fact of making representations which turn out not to be true, unconnected with a fraudulent design, is not sufficient; that an intention to deceive, or actual fraud, is essential. But more recent considerations of this question have led the courts to adopt a more comprehensive construction of "fraudulent" as used in the rule. Mr. Justice Bell, in *Boyd v. Browne*, 6 Pa. St. 310, 316, thus states the principles that now govern in the case of the false and fraudulent recommendation of another's business standing and credit:

"The ground of action is the deceit practiced upon the injured party, and this may be either by the positive statement of a falsehood, or the suppression of material facts, which the inquiring party is entitled to know. The question always is, Did the defendant knowingly falsify, or willfully suppress the truth, with a view of giving a third party a credit to which he was not entitled? It is not necessary that there should be collusion between the party falsely recommending and the party who is recommended; nor is it essential, in support of the action, that either of them intended to cheat and defraud the trusting party at the time. It is enough if such has been the effect of the falsehood relied on. Misrepresentations of this character are frequently made from inconsiderate good nature, prompting a desire to benefit a third person, and without a view of advancing the party's own interests. But the motives by which he was actuated do not enter into the inquiry. If he make representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit." And although misrepresentation without design is said, in 2 Kent Com. sec. 490, to be insufficient for an action, yet it is observed, in qualification of this general statement: "But if recommendation of a purchaser, as of good credit, to the seller, be made in bad faith, and with knowledge that he was not of good credit, and the seller sustains damage thereby, the person who made the representation is bound to indemnify the seller." What bad faith is, or what may be deemed fraudulent within the meaning of the rule regarding false and fraudulent representations, is then the point to be determined. The positive assertion of that as true which is known not to be true, is, beyond doubt, fraudulent; the concealment of material circumstances by the party making the recommendation, is also fraudulent, as stated in the above decision from Pennsylvania; but is the positive assertion of that as true which the party has not reasonable grounds to believe to be true, fraudulent? It has been held that if the defendant honestly thought the person he recommended, to be solvent and worthy of credit, no liability would arise: *McCracken v. West*, 17 Ohio, 16; and in all those cases where an intention to deceive is regarded as essential. But ought not one who asserts as a fact, that which is untrue, and which he has not reasonable cause for believing to be true, to be held responsible for losses which his reckless statements may have occasioned? Does not such conduct amount to

a fraud in law, for which a party should be answerable? No decision has been found going this length, although *Munroe v. Pritchett*, 16 Ala. 785, 790, seems to favor it, and in *Russell v. Clark*, 7 Cranch, 69, Chief Justice Marshall says that "in such case it is certainly incautious and indiscreet to use terms which imply absolute and positive knowledge. It may, perhaps, be admitted that in such a case fraud may be presumed on slighter evidence than would be required in a case where a letter was written, with more circumspection. Yet in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he has never been declared to be responsible for its actual verity."

This brings us to the distinction which has been drawn between the statement of a fact and the expression of an opinion, regarding another's ability to meet his liabilities. For the honest expression of an opinion, one can not be compelled to make good the loss sustained by another who has relied upon it. A prospective seller takes the opinion for what it may be worth; he can not demand that one who has said he believed another to be solvent should be equally liable with one who has said that that other is solvent. The framing a recommendation in the form of an opinion, itself casts some doubt upon the actual existence of the fact concerning which the opinion is expressed. In *Crown v. Brown*, 30 Vt. 707, on a written order directed to the plaintiff to sell the writer certain books, the defendant wrote: "I consider the above order good." The plaintiff urged that this indorsement induced them to sell the books, the price of which they could not recover from the buyer, the writer of the order. The court, notwithstanding, construed such indorsement to amount to no more than the statement of the defendant's belief in regard to the purchaser's pecuniary responsibility, and held that if that belief was honestly entertained, it could not subject him to liability for falsehood or deceit, however erroneous it might be. An opinion might readily be given with the view to deceive, and where such is the case, the same liability would attach as would follow a false and fraudulent representation respecting another's credit.

THAT THE STATEMENT MUST BE FALSE is illustrated by the facts of a recent New York case, where it was remarked that if the person represented to be solvent, is so in fact, though the party making the representation believed him to be insolvent, yet can there be no recovery against such party. "No rule of law with which I am acquainted," says Judge Westbrook in *Babcock v. Libbey*, 53 How. Pr. 255, 267, "will justify a recovery upon a true representation, because the party making it supposed it to be otherwise. Such a rule would certainly not sustain an action to recover damages upon goods sold, nor for trusting a party, when the representation was literally true."

WHETHER REPRESENTATION MUST BE IN WRITING.—Before Lord Tenterden's act, 9 Geo. IV., c. 14, it was not necessary, in order to fix one's liability for a false and fraudulent representation respecting another's credit, that such representation should be in writing. By that act it was provided that "no action shall be brought after the first of January, 1829, whereby to charge any person, upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith." In several of our states this act, in substance, has been introduced. Where it does not prevail, an oral representation will be sufficient to render one liable, if it have the requisites herein specified. So far as could be discovered, those

states which have adopted Lord Tenterden's act are: Alabama, Rev. Code, 1867, § 1864; Indiana, 1 Davis Stat. 1876, p. 504; Maine, Rev. Stat. 1871, p. 787; Massachusetts, Gen. Stat. 1860, p. 527; Michigan, 2 Comp. Laws, 1873, p. 1457; Missouri, 1 Wagner Stat. 1870, p. 657; Vermont, Gen. Stat. 1862, p. 453; Virginia, Code, 1860, p. 627; West Virginia, Kelly's Rev. Stat., c. 95, § 1; Wyoming, Comp. Laws, 1876, p. 358.

HOIT v. HODGE.

[6 NEW HAMPSHIRE, 104.]

ALL WAGERS upon matters in which the parties have no interest, beyond what is created by the wager itself, are void.

Writ of error to reverse a judgment of the court of common pleas. The action was assumpsit for money had and received. Hodge and Bunker made a bet of five dollars each on a horse-race to be run, and deposited the money with Hoit. It was agreed that the horses should run until the wager was won, and that if either should refuse to let his horse run, the money was to be forfeited to the other. The horses ran once, but neither won. Hodge then withdrew his horse and refused to let him run again, and demanded his deposit of Hoit. The latter refused to surrender the deposit, but gave the ten dollars to Bunker, who was ready and willing to run his horse again. The jury found for the plaintiff, pursuant to the direction of the court.

B. Emerson, for the plaintiff in error.

N. Eastman, contra.

By Court, RICHARDSON, C. J. The wager, in this case, was upon a matter in which neither party had any interest beyond what was created by the wager itself; and if the wager had been won by Bunker, on the seventh of August, 1830, Hodge would have been entitled to recover of Hoit the money he deposited, if demanded at any time before it was paid over to Bunker. All wagers, upon matters in which the parties have no interest, are void contracts: *Perkins v. Eaton*, 3 N. H. 152; 1 Barn. & Ald. 683; 3 Stark. Ev. 1655; 16 East, 150; 1 Car. & P. 613.

That part of the contract which stipulated, that if either should refuse to let his horse run, he should forfeit to the other the money deposited, was nothing more nor less than a wager upon the courage of the parties to have the bet upon the horses decided, and stands upon the same ground as the bet upon the horses.

The instruction given to the jury, in the court below, was correct, and the judgment must be affirmed.

WAGERS.—See the decisions on this subject appearing in this series, collected in the note to *Stoddard v. Martin*, 19 Am. Dec. 643. The invalidity of wagers upon horse-races, and the subject of wagers at common law, are considered in the recent decision of *Gridley v. Dorn*, supreme court of California, opinion filed December 31, 1880, 5 Pac. C. L. J. 935.

SAWYER v. FELLOWS.

(6 NEW HAMPSHIRE, 107.)

BOUNDARY—A PAROL AGREEMENT, BY THE OWNERS OF ADJOINING LOTS, that a line run by a surveyor shall be the boundary between them, is, when executed, conclusive upon them and upon those claiming under them.

WRIT of entry. General issue pleaded. The demandant and the tenant were owners of adjoining tracts; the land in question lay between the lots near the dividing line. The demandant offered evidence tending to prove that he and one Moody, under whom the tenant held, had agreed to procure a surveyor to run the boundary line between them; that the line was run; that the demandant and Moody agreed to such line as the boundary between them, and put up stakes and built a fence on the line. If this line is the true boundary between the tracts, the demandant was owner of the land in question.

The jury found as the demandant had claimed, and gave a verdict in his favor.

Ham and Bartlett, for the demandant.

Lyford, contra.

By Court. We consider the law as settled, that where the owners of adjoining lots agree to a particular line, as the dividing line between them, the agreement is conclusive against them, and all persons claiming under them: 2 Stark. Ev. 599; *Boyd's Lessee v. Graves*, 4 Wheat. 513; *Jackson v. Dysling*, 2 Cai. 197; *Makepeace v. Bancroft*, 12 Mass. 469; 2 Johns. 224.

Judgment on the verdict.

FIXING BOUNDARY LINE BY PAROL.—The rule of the principal case will be found in harmony with the decisions of other states, as collected in the note to *Smith v. Dudley*, 13 Am. Dec. 222.

RANDALL v. PROPRIETORS OF CHESHIRE TURNPIKE.

[6 NEW HAMPSHIRE, 147.]

WHERE A BRIDGE BECOMES DEFECTIVE by the gradual decay of its timbers, and the danger is not open and visible to all, the owners thereof, who continue to keep the same open, and to take toll, are liable, notwithstanding they notified a person who was injured thereby not to try to pass over.

CASE for damages sustained by the plaintiff in falling through a bridge. It was admitted upon the general issue, that the defendants were a corporation owning the turnpike between Charlestown and Keene, authorized to take toll, and, by law, liable for all damages sustained by any want of repairs in the road; and further, that there was a bridge which had wanted repairs for two or three years before the day on which the accident happened, and which by many was considered dangerous to pass with a heavy load. It appeared that the plaintiff was passing over the road with a very heavy load drawn by five horses; that before he came to the bridge, he was told by some member of the corporation that the bridge was not safe, and that he had better go another way, but the plaintiff said that heavier loads than his had gone over, and he drove on. In crossing the bridge, the wagon and two of the horses fell through, and were injured. The road was kept open and toll taken at the time the accident occurred.

The court instructed the jury, that as the defect resulted from gradual decay of the timbers of the bridge, and it had been generally known for two or three years that there was danger, so long as the corporation kept the road open for public use and received toll, so long they were responsible for the sufficiency of the road; that it was not enough to give notice of danger in order to exonerate themselves; they were bound to inform those who passed that there was danger for which they would not be responsible, and to have refused to take toll. Verdict for the plaintiff. Motion for a new trial.

Wilson, for the plaintiff.

Hubbard, contra, cited *Farnum v. Concord*, 2 N. H. 394; *Thompson v. Bridgewater*, 5 Pick. 190; *Smith v. Smith*, 2 Id. 621 [13 Am. Dec. 464]; *Harlow v. Humiston*, 6 Cow. 191; *Butterfield v. Forrester*, 11 East, 60; *Flown v. Adam*, 2 Taunt. 314; 3 Stark. 986.

By COURT. We have attentively considered this case, and are

of opinion that the directions given to the jury were correct. Wherever, in these cases, the danger results from natural decay, and is not open and visible to all, the corporation is responsible so long as they take toll. It is not enough that they give notice that there is danger. In order to exonerate themselves, they must give notice that there is danger for which they will not be answerable, and must refuse to take toll.

Judgment on the verdict.

PARKER, J., having been of counsel, did not sit.

DEFECTIVE HIGHWAYS, municipal corporation's liability for: *Moser v. Leicester*, 6 Am. Dec. 63. Turnpike corporation's liability for: *State v. Morris Turnpike Co.*, 7 Id. 579.

BAILEY v. SIMONDS.

[6 NEW HAMPSHIRE, 189.]

A NOTE PAYABLE "in good leather, such as suits," is payable in such leather as would suit the payee.

WHERE A NOTE IS PAYABLE IN GOODS at a particular place, on demand, the maker is bound to have the goods always ready.

ASSUMPSIT. The plaintiff alleged that the defendant, for value received, promised to pay the plaintiff eighty-seven dollars and fifty cents in good leather, such as would suit the plaintiff, on demand, at Mr. Slade's tanyard, in Walpole, with interest. General issue pleaded. Plaintiff produced a note signed by the defendant, but it was payable "in good leather, such as suits." An objection that the variance was fatal was overruled. On the sixteenth of February, 1828, plaintiff presented the note at the tanyard, and demanded payment in heavy sole leather. There was none such there, but there was, immediately after the sixteenth of February, at that place, ready for the plaintiff, enough of such leather to pay the note. Verdict for the plaintiff. Motion for a new trial.

Chamberlain, for the plaintiff.

Hubbard, contra.

By Court. The contract is stated in the declaration, not in the words of the note, but according to their legal effect. The note is, without doubt, payable in such leather as would suit the plaintiff.

It is settled that when a note is made payable in goods at a par-

ticular place, on demand, the maker is bound to have the goods always ready: *Mason v. Briggs*, 16 Mass. 453; 5 Cow. 518.

Judgment on the verdict.

PARKER, J., having been of counsel, did not sit.

NOTE PAYABLE IN MERCHANDISE.—See the note to *Roberts v. Beatty*, 21 Am. Dec. 422; *Hunter v. Sparlock*, 22 Id. 165. That such notes are not negotiable, see same references, and *Rhodes v. Lindley*, 17 Id. 580, and note.

NOTE PAYABLE AT A PARTICULAR TIME AND PLACE: *Mellon v. Croghan*, 15 Id. 163; *Sullivan v. Mitchell*, 6 Id. 546; *Smith v. McLean*, 7 Id. 693; *Conn v. Gano*, 13 Id. 639.

CONGREGATIONAL SOCIETY IN TROY v. PERRY.

[6 NEW HAMPSHIRE, 164.]

INHABITANTS OF TOWNS ARE COMPETENT WITNESSES for the towns in which they reside, without a release.

GIVING A NOTE TO A CORPORATION estops the maker to deny its corporate existence.

CONSIDERATION FOR SUBSCRIPTION.—When several agree to contribute to a common object which they wish to accomplish, the promise of each is a good consideration for the promises of the others.

ASSUMPSIT on the following note: "January 27, 1825. For and in consideration that a fund of one thousand dollars, or upwards, be raised for the support of the ministry, in the congregational society in Troy, I promise to pay said society, in part of the fund, fifty dollars, on demand, with interest to be paid annually. C. Perry." The general issue was pleaded, with notice that defendant would show that the plaintiffs were not a corporation authorized by law to maintain action, and that the statute of limitations had run. To prove a promise within six years, and a due organization of the society, a member thereof, one Lyman Wright, was permitted to testify, against the defendant's objection. The defendant offered, but was not allowed to prove, that since the giving the note, and before suit was commenced, he had ceased to be a member. It was in evidence that on the day of the date of the note, a fund of one thousand dollars was raised by notes of similar import with this, made by different persons.

Verdict for the plaintiff, subject to the opinion of the court.

Edwards and Henderson, for the plaintiff.

Wilson, jun., and Chamberlain, contra.

By Court, GREEN, J. It is objected that Wright was an incompetent witness, because he was a member of the corporation. But it is decided that inhabitants of towns are competent witnesses for the towns in which they reside, without a release: *Eustis v. Parker*, 1 N. H. 273. And we are of opinion that the members of parishes and school districts stand on the same ground, and that the witness in this case was properly admitted.

And we are of opinion that it was not necessary in this case to prove that the corporation was duly organized. The giving of the note is an admission by the defendant of the existence of the corporation, and he can not now be permitted to deny that there is a duly organized corporation: *Angell on Corp.* 881.

It is further contended that the defendant ought to have been permitted to show that he had ceased to be a member of the corporation. But we are of opinion that the evidence rejected was wholly immaterial. By ceasing to be a member of the society he ceased to be liable for any tax afterwards raised by the society, but he was not thereby discharged from his contract. The note was not a tax.

It is objected that the note is without consideration and void. But we are of opinion that a good consideration was shown in this case. When several agree to contribute to a common object which they wish to accomplish, the promise of each is a good consideration for the promises of the others: *George v. Harris*, 4 N. H. 533 [17 Am. Dec. 446].

Judgment on the verdict.

PARKER, J., having been of counsel, did not sit.

MUTUAL PROMISES SUFFICIENT CONSIDERATION FOR A PROMISE.—*Teicher v. Woods*, 7 Am. Dec. 305; *Johnson v. Reed*, 6 Id. 36; *Howe v. O'Mally*, 3 Id. 603.

VOLUNTARY SUBSCRIPTION FOR PUBLIC OBJECT.—*Farmington Academy v. Allen*, 7 Id. 201.

ESTOPPEL TO DENY POWER OF CORPORATION TO CONTRACT.—*N. Y. Firemen Ins. Co. v. Ely*, 13 Id. 108. Party contracting with an association as a corporation, and giving it a receipt, is not estopped thereby from denying its corporate existence in a suit brought by it on such a contract: *Welland Canal Co. v. Hathaway*, 24 Id. 51, and note 53.

HINKLEY v. DAVIS.

[6 NEW HAMPSHIRE, 210.]

ADMISSIONS OF A DECEASED PRINCIPAL ARE EVIDENCE against the surety, when they are made against the principal's interest at a time when he was well acquainted with the circumstances, and no motive to misrepresent appears.

ASSUMPSIT against a surety on a promissory note. The defense was that the note had been paid. To rebut this, the declarations of the principal, now deceased, were offered and received in evidence against the defendant's objection. Verdict for the plaintiff; motion for a new trial.

Wilcox, for the plaintiff.

Britton and Bell, contra.

By Court, **RICHARDSON, C. J.** The admissions of Blood, in this case, were made at a time when no motive to misrepresent the matter can be conceived. They were admissions against his interest. He is now dead, and can not be called as a witness; and his admissions related to a matter with which he must have been well acquainted.

The question is whether, under these circumstances, the admissions of Blood, the principal, are evidence against the defendant, who was only a surety?

In general, admissions by one man are not evidence against another. But to this there are exceptions. In many cases where a man has the means of knowing a fact, and it is against his interest to admit it, his admission is evidence, even against another person. The evidence results, in such a case, from the improbability of a man's admitting as true what he knows to be false, against his interest. In some cases such an admission is as strong against another person as it is against the person who makes it.

In *Warren v. Greenville*, 2 Str. 1129, an entry by an attorney in his debt book for a deed of surrender, was held to be evidence of a surrender against another person, the charge appearing by the book to have been paid, and the attorney being dead. So in *Higham v. Ridgway*, 10 East, 109, a charge in the book of a man midwife, for attending a woman in child-birth on a particular day, was held to be evidence of the time of the birth of the child, the charge being marked in the book as paid at the time, and the man midwife being dead.

Upon an issue between A. and B., whether C. died possessed

of certain property, declarations of C. that the property had been assigned to A. are admissible against A.: *That v. French*, 1 Taunt. 141.¹ There are many cases to be found in the books where the decision rests on this ground: *The King v. Hardwick*, 11 East, 578; *Strong v. Wheeler*, 5 Pick. 410; 1 Stark. Ev. 308-326; *Barry v. Bebbington*, 4 T. R. 514.

In *Goss v. Wallington*, 3 Brod. & B. 132, the question arose, how far receipts given by a principal, who was a collector of taxes, were evidence against his surety; but it was not decided. But Dallas, C. J., said he could not agree that receipts by the principal could in no case be evidence against the surety. And Starkie, in his treatise on Evidence, vol. 3, 1388, shows very clearly that upon principle the receipts were evidence against the surety, being admissions by a party against his interest.

There may be cases in which admissions by a principal will not be evidence against a surety. But there seems to be nothing in this case which renders the admissions of Blood inadmissible evidence against this defendant.

CORY v. LITTLE

[6 NEW HAMPSHIRE, 212.]

A HORSE FOUND TRESPASSING IN ANOTHER'S CLOSE may be turned into the highway, without any liability arising from its there straying away.

WRIT of error in an action of trespass brought by Little against Cory. They were neighboring land owners, one lot fifty rods wide being between them. Little's mare had strayed into Cory's close; he turned her into the highway, and she strayed away. Whence this action. The defendant asked a direction to the jury that he was entitled to a verdict. But the court, refusing so to act, instructed the jury that Cory had a right to remove the mare from his close, using no unnecessary force, nor acting unreasonably, and that the amount of force necessary, and the reasonableness of the act, were for the jury. Verdict for Little. Cory excepted.

Bell and Woods, for the defendant in error.

J. Smith, *contra*.

By Court, GREEN, J. The mare was in Cory's close wrongfully, and he had a right to remove her. The only question to

1. *That v. French*.

be decided is, whether he made himself a trespasser by an improper exercise of this right. There was no road adjoining his close into which he could turn her. He had only the choice to turn her back into the close of the owner, or to turn her into the woods in the way he did.

In order to turn her back into Little's close, there were two fences to pass. In the other way there were three. But this circumstance is immaterial, as is also the circumstance that he turned her away in a direction opposite to that of Little's close. We are not aware of any rule of law that made it his duty to turn her out in the way that had the fewest obstructions, or in a direction towards Little's close.

He took the nearest way to turn her from his own close, and probably the way which was most likely to prevent her return; and there was no evidence that he did her any injury.

What was the evidence, then, that proved him to be a wrong-doer? We see none. He found the beast in his field, and turned her into the road. This is all. There is no color of pretense that he could be held to be a trespasser for this.

We are therefore of opinion that the court ought to have given to the jury the instructions for which the counsel for Cory asked, and that the judgment must be reversed.

See *Richardson v. Carr*, *ante*, 65, and citations in note, in regard to right of land-owner in respect to trespassing cattle.

DOTY v. HAWKINS.

[6 NEW HAMPSHIRE, 247.]

A BAILER IS LIABLE IN TROVER where he refuses to deliver the property to one whom he knows to be the owner thereof, and from whom his bailor obtained the property wrongfully.

TROVER for a cow, two sheep, and a lamb. General issue pleaded. The chattels were the property of the plaintiff in October, 1827, when her father, without any authority, sold them to G. and E. A. Webb, who placed them with the defendant for safe keeping. The plaintiff demanded them of the defendant while they were still in his possession, but he, replying that "he had no doubt that they were the property of the plaintiff," said that he could do nothing, the plaintiff must go to the Webbs. The jury returned a verdict pursuant to the instructions of the court. Motion for a new trial.

Pearson and Bell, for the plaintiff.

Goodall and Woods, contra.

By Court, UPHAM, J. In this case, the plaintiff's title to the property has been settled by the jury. The Webbs' claim, therefore, by a pretended sale from any other source than the plaintiff, conveys no right. The common maxim, that the buyer must beware of his title, applies to them, and they, by their purchase, can be no better off than the original wrong-doer. The moment the owner comes and demands possession of the property, and it is denied him, it is a conversion. This is true in all cases where there is an unqualified denial, but the ground taken by the defendant's counsel is, that this was a qualified denial of such a character as to exempt it from the general rule.

It is said that if an individual, in fact, casually finds property, as is in form alleged in declarations in trover, that it would not constitute a conversion for him to require some evidence of ownership, and this is undoubtedly true. The individual finding property has a qualified interest in it, and can not be called upon to surrender it without reasonable cause, even by the owner, if thereto required. The principles governing this exception have been correctly stated, but they are not applicable to the present case. Here the defendant admitted the plaintiff's ownership of the property, but set up the fictitious claim of the Webbs as a justification for his detention, and the case supposed would be more parallel if the person finding property admitted the ownership of the one claiming it, but still required him to produce his proof, which would be an illegal detention.

Here the case finds that the defendant said "he had no doubt that the creatures in question were the property of the plaintiff, but that he could do nothing, the plaintiff must go to the Webbs;" claiming, in fact, to hold the property just so long as the Webbs directed him so to do, while at the same time he knew and admitted that they had no title—a species of detention which can not be justified, and which must be considered, as in ordinary cases, an unqualified conversion.

There is another view of the case, and that is that the individual under whom the Webbs claim was a trespasser. He took the property from the plaintiff's possession without authority—at least there is nothing in the case to show that he had such authority—and sold the property to the Webbs. The authorities would seem to sustain the position that the defendant,

having only a trespasser's title, a demand upon him was unnecessary as a previous requisite to a suit. However this may be, it is unnecessary now to decide, as under the circumstances of the case, with the demand and refusal as made, the evidence of conversion is beyond dispute. To this latter point are authorities: Bull. N. P. 47; *Parker v. Godin*, 1 Stra. 813; *Alexander v. Southey*, 5 Barn. & Ald. 247; 2 Car. & P. 471; *Cobbett v. Clutton*; *Stephens v. Ehwall*, 4 Mau. & Sel. 259; 3 Stark. Ev. 1501; *Perkins v. Smith*, 1 Wils. 328.

Judgment on the verdict.

PARKER, J., having been of counsel, did not sit.

PARSONS v. BELLOWS.

[6 NEW HAMPSHIRE, 289.]

A COUNT IN SLANDER, not setting out the words alleged to be slanderous, is bad, even after verdict.

SLANDER. Among other counts was one alleging that the defendant had, in a certain discourse with divers persons, falsely and maliciously charged the plaintiff with theft. The words uttered were not set out. Verdict for the plaintiff. Motion in arrest, on the ground that the general count in which the words were not set out, was bad.

Parker and Smith, for the motion. The words must be set forth: Stark. on Sland. 266-270; 1 Chit. Pl. 381, 382; *Fox v. Vanderbeck*, 5 Cow. 515; *Ward v. Clark*, 3 Johns. 10; *Cook v. Cox*, 3 Mau. & Sel. 110. The statement of the words written or spoken must correspond with the publication to be proved, and they must be proved substantially as laid: *Mailand v. Gouldney*, 2 East, 438; *Walters v. Mace*, 2 Barn. & Ald. 756; *Cartwright v. Wright*, 5 Id. 615.

Bell, contra.

By Court, RICHARDSON, C. J. A long series of well-considered decisions seems to us to have settled the question which this case presents; and, in our opinion, it must now be considered as a well-established rule, that in a count for slander by words, the words themselves must be set out, and be set out, if it be required to make them intelligible, with proper innuendoes, and a sufficient explanation.

It is true there are found in the books forms of general counts

in slander, where the words are not set out. But if we except the case of *Nye v. Otis*, 8 Mass. 122 [5 Am. Dec. 79], no adjudged case is found in the books sustaining such a count. And in that case we find nothing stated which tends in any degree to show the propriety of sustaining such a count, nor is there any attempt to reconcile that decision with the numerous cases found in the books, which seem to establish a different rule. It is there said, that such a count is not prejudicial to the defendant. But down to the time of that decision, it seems generally to have been supposed that it was of some importance to the defendant to know the certainty of the charge he was to meet.

We are of opinion, that as the verdict has been taken in this case on all the counts, and the general count is insufficient, the judgment must be arrested.

PARKER, J., having been of counsel, did not sit.

PROVING IDENTICAL WORDS IN SLANDER.—See *Hates v. Ambrose*, 13 Am. Dec. 496 and note.

FRANKLIN v. MARCH.

[8 NEW HAMPSHIRE, 264.]

TO MAKE AN INSTRUMENT NEGOTIABLE, no particular form of words is necessary. The following is sufficient: "Oct. 19, 1830. Good to R. C., or order, for thirty dollars, borrowed money. J. W. M."

THE WORDS "VALUE RECEIVED" are not essential.

AN INDORSEER, AFTER A NOTE IS PAYABLE, who learns from the maker circumstances which might have been a good defense, is entitled to recover where the maker says he will pay if indulgence is granted, and such indulgence is given.

ASSUMPSIT by an indorsee against the maker of the following instrument: "Oct. 19, 1830. Good to Robert Cochran, or order, for thirty dollars, borrowed money. Joseph W. March." The facts appear from the opinion of the court, to whom the case was submitted on a report of arbitrators.

Hackett, for the plaintiff.

E. Cutts, contra.

PARKER, J. The instrument declared upon in this case is not in the usual form of a promissory note, but no particular form of words seems to be necessary to give it that character: Bayley on Bills, 8; Chit. on Bills, 53; *Casborne v. Dutton*, Sel. N. P. 895; *Morris v. Lee*, Ld. Raym. 1396; S. C., Stra. 629; *Chad-*

wick v. Allen, Id. 706; *Goshen Turnpike v. Hurtin*, 9 Johns. 217 [6 Am. Dec. 273]; *Russell v. Whipple*, 2 Cow. 536; *Mitchell v. Culver*, 7 Id. 337.

It has repeatedly been held that the words "value received," though usually inserted, are not essential: 3 Kent Com. 50; *Poplewell v. Wilson*, Stra. 264; *McLeod v. Sned*, Ld. Raym. 1481; *Emery v. Bartlett*, Id. 1556; Bayley, 24; Sel. N. P. 336. The note in this case shows that it is founded upon a sufficient consideration, it purporting on its face to have been given for money borrowed; and "good to R. C. or order," is equivalent to a promise to pay R. C. or order.

The counsel for the defendant has not contended in the argument that this is not a negotiable promissory note, but denies the right of the plaintiff to recover, because the note was indorsed long after it was payable; and contends that the circumstances, as between Cochran and the defendant, at the time, and before the indorsement, were such that he could have successfully defended against Cochran in an action on the note, and that he is entitled to make the same defense against the plaintiff, who took it after it was to be considered as a discredited note.

The facts will support the position that the plaintiff took the note under such circumstances as to put him upon an inquiry relative to its validity; and if the case had rested here, it might have been necessary to consider how far the facts stated would constitute a sufficient defense as against the payee. But we do not find it necessary to examine that part of the case. The plaintiff having taken the note, presented it the same day to the defendant for payment; and if the defendant had then refused to pay it, the plaintiff might perhaps have obtained the amount of Cochran in some other way. But instead of this, the defendant told the plaintiff that if he would wait a month or so, he would pay the note; and the plaintiff has fully complied on his part, as he waited several months before commencing this suit. In this time, the circumstances of Cochran may have materially changed, and the security of the plaintiff may depend upon a recovery in this case.

Wiggin v. Damrell, 4 N. H. 69; and *Albe v. Little*, 5 Id. 217, are direct authorities for the plaintiff, unless the other circumstances attending the transaction between the plaintiff and the defendant distinguish this case in principle from those.

The case finds that the defendant, at the time the note was presented to him, stated that he had not supposed this was a

promissory note; that he understood, when he signed it, that it was a receipt; and that he had claims against Cochran.

But, after stating all this, the defendant closed by a promise that he would pay, notwithstanding these facts. Upon this the plaintiff relied, and the case stands, therefore, as if those facts had not been stated. Any defense, which those facts might have constituted, was waived when the defendant said he would pay, notwithstanding, and he can not now be permitted to set them up in bar of the plaintiff's recovery.

Judgment for the plaintiff.

WHAT INSTRUMENTS ARE NEGOTIABLE.—See the note to *Weekley v. Sergeant*, 14 Am. Dec. 419, and note.

FRENCH v. HOYT.

[6 NEW HAMPSHIRE, 370.]

ADMINISTRATOR OF INTERSTATE ESTATE APPLYING FOR LEAVE TO SELL REALTY must give notice of such application, otherwise the sale under the license conveys no title.

SUCH NOTICE IS NECESSARY, notwithstanding the administratrix is the mother of the minor heirs for whom no guardian has been appointed, and notwithstanding the insolvency of the estate.

THE MOTHER, AS GUARDIAN BY NATURE, OR FOR NURTURE, has no control over the estate of the child, nor is she under any responsibility for the due care of it.

TRESPASS for breaking and entering the plaintiff's close. The defendants were the heirs of William H. Hoyt, their father. The plaintiff claimed under a sale by the widow, the administratrix, under a license of the probate court. The application for the license was made without any notice, and when the defendants were minors. The father died seised of the *locus in quo*. The case was submitted upon these facts.

G. Sullivan and C. H. Atherton, for the plaintiff.

James Bell, contra.

PARKER, J. By the statute of July 2, 1822, empowering the several judges of probate to license executors, administrators, and guardians to sell real estate in certain cases, it is enacted, that in default of personal estate to answer the just demands against the estate of any person deceased, the judge of probate, where the administration was granted, is empowered to license and authorize the executor or administrator of such estate to

sell at public auction, so much of the real estate of the deceased as shall raise a sum of money to be fixed upon by the judge, and sufficient for the purpose—" Provided, nevertheless, that in all cases of application by an executor or administrator for license to sell real estate, the judge of probate, before he grants such license, shall cause the heirs and devisees to such estate, or their guardians, to be notified thereof, and at what time and place they may be heard concerning the same; and if they will give bond with sufficient sureties for the payment of said demands, and to save harmless the executor or administrator therefrom, no license shall be granted."

The second section of the same act provides, that "when any estate in land, other than a present fee in the same, is to be sold by virtue of this act, such estate shall be specified in the application for license in the order of notice, and the license."

It is agreed in the present case, that a license was granted to sell the real estate of William H. Hoyt, the intestate, on the application of the administratrix of his estate, without any order of notice, and without any notice to the heirs; but it is contended that the heirs, being minors at the time, and no guardian having been appointed for them, an order of notice and notice to them was not necessary, because the administratrix who made the application was their mother, and guardian by nature—that she had knowledge, of course, and that a notice to the minors themselves would have been useless. We are of opinion that this argument can not avail to justify the proceedings in this case.

The statute, in its terms, evidently contemplated that, whoever might be executor or administrator, and whether guardians had been appointed or not, there should be an order of notice, and a day appointed for a hearing. The extreme youth of minor heirs, who are without guardians, may in some cases render this a useless formality, so far as respects any care of their interests, by themselves personally, but even in such case, they may have relations and friends competent and disposed to guard their rights, and who, as next friends, will be entitled to be heard in their behalf, and will take the necessary measures to protect and preserve their interests.

Nor is it any answer to this to say that the provision of the statute is so drawn, that an order of personal notice to heirs of tender age, who would neither know the object of it, nor be able to communicate the fact to their friends, would be a compliance with the requisitions of the statute, and yet be of no

avail. It is perhaps within the general discretion of the judge of probate, what notice it is proper to order, under the circumstances of each case, and if so, it is to be presumed that the discretionary power will be exercised in a suitable and proper manner, and the order of notice be such as is best calculated to effect the objects of the statute. It would undoubtedly be an indiscreet exercise of his powers, to order personal notice to infants too young to be able to comprehend its purport and object, and whether such notice could be held legal, as within the discretion of the judge, it is not necessary now to decide.

There was here no notice of any kind. For aught which appears, no one except the mother, who was the applicant, had any knowledge of it. But the mother, as guardian by nature, or for nurture, has no control over the estate of the child, nor is she under any responsibility for the due care of it: *Kline v. Beebe*, 6 Conn. 500; 2 Kent Com. 181; *Genet v. Tallmadge*, 1 Johns. Ch. 3; *Miles v. Boyden*, 3 Pick. 213; *Dagley v. Tolferry*, 1 P. Wms. 285; Co. Lit. 88, C, and notes 12 and 13, Day's ed.; *Reeve Dom. Rel.* 314. Knowledge by the mother, therefore, insured no legal protection to the rights of the minors, for she had no legal custody of the estate in their behalf, nor, as such guardian, owed any duty in relation to it.

Even if a father, who more generally superintends the pecuniary interest of his children, was applying, as executor or administrator of an estate in which they were interested, for license to sell that estate for the payment of the debts, there must be an order of notice, and a day of hearing, before license could be granted. And so if the executor or administrator applying, held at the time a letter of guardianship over the heirs. It is evident that the law did not intend to leave the rights of those who might be interested adversely to the application to the sole care of the individual making that application, even if he were a guardian duly appointed according to law.

An order of notice, and a day of hearing, are expressly made necessary by the sixth section of the same statute, where a guardian applies for license to sell the real estate of his ward, notwithstanding it is the special duty of such guardian to take care of the interest of his ward, and he is moreover under bonds for the faithful discharge of that duty. The ward himself, or others in his behalf, may still show in such case that a license ought not to be granted, and we think this furnishes a conclusive argument to prove that there is no sufficient reason to dispense with an order of notice, and a day of hear-

ing, upon an application for license to sell for the payment of debts, although the executor and administrator making the application may be the mother, father, or even the guardian of the heirs interested in the estate.

It has been further urged, that the estate of William H. Hoyt was in fact insolvent, that the heirs, therefore, could have no interest in the application for license to sell, and that the necessity for notice was thereby superseded.

But the statute has made no exception of such a character, and, moreover, it could not be judicially ascertained that the estate was in fact insolvent, until the real estate was actually and legally sold, and the accounts of the administratrix rendered. That the estate was represented insolvent, was no certain indication that it would prove so. That upon an estimate of the value of the real estate, such was probably the fact, can furnish no reason for disregarding a plain and positive provision of the statute.

To hold that the eventual insolvency of the estate might furnish a dispensation from the requisitions of the act, would make the validity of the proceedings depend upon the amount realized by the sale; and if, upon a settlement of the administration accounts, it was found that the sum so received was sufficient, with the personal estate, to pay all the debts, and that no notice had been given, then the sale would become void, and the purchaser's title fail; the proceedings must be commenced *de novo*, and unless notice should be given upon the subsequent applications, they must be repeated until the proceeds of the sale should be small enough to make the sale itself legal.

It is only necessary to state this result to show that this argument can not avail the plaintiff.

The rule prescribed by the statute is plain and simple; it contains no exceptions, nor do we discover any sufficient reasons why any should be made in this case.

Judgment for the defendants.

GUARDIAN BY NATURE.—See *Combs v. Jackson*, 19 Am. Dec. 568, where this relation at common law and in this country is examined.

DAVIS v. DREW, TRUSTEE OF KNIGHT.

[6 NEW HAMPSHIRE, 399.]

GUARDIAN OF AN INSANE PERSON IS NOT CHARGEABLE as trustee, at suit of creditors of the ward, until there has been an accounting and a balance found in the guardian's hands.

ASSUMPSIT. Drew stated in his disclosure that he was the guardian of Knight, an insane person, and that property of the latter was in his, the guardian's, hands.

Lyford, for the plaintiff.

N. Eastman, contra.

By Court, RICHARDSON, C. J. An insane person may sue and be sued: Com. Dig. "Idiot," D. 7. And an insane person may be arrested on mesne process and execution: 1 Tidd, 184; 2 T. R. 890; 4 Id. 121; 6 Id. 133; 2 Bos. & Pul. 362; *Leighton's case*, 14 Mass. 207. And when an execution is obtained against an insane person, it may be satisfied out of his property: 5 Mass. 301. But every guardian of a person *non compos mentis* gives bond for the faithful discharge of his duty, according to the law, and it is his duty to pay the debts out of the property, in the least expensive manner: 1 N. H. Laws, 340.

No action can be maintained by a guardian against his ward until his accounts are adjusted in the probate court: 2 N. H. 395. And it is supposed that no action can be maintained by the ward against the guardian, for any money in the hands of the guardian, until the accounts are adjusted by the judge of probate. It can not be known what is in the hands of the guardian, until the accounts are adjusted. A creditor may compel the guardian to adjust his accounts, and if, after that, it is found there is a balance in his hands, and he refuses to pay any judgment which may have been obtained against his ward, it will be a breach of the condition of his bond.

Perhaps, if his accounts were adjusted, and it appeared that he had a balance in his hands, he must be adjudged trustee.

But in this case, as it does not appear that his accounts have been adjusted, he must be discharged.

Judgment for the trustee.

LAMOS v. SNELL.

[6 NEW HAMPSHIRE, 413.]

IN MITIGATION OF DAMAGES IN SLANDER, the defendant may give evidence of the plaintiff's general bad character, but not of particular facts tending to impeach his character.

SAME.—The evidence as to general character is not confined to the plaintiff's character in respect to the matters charged in the slander.

SLANDER. The words set out were: "That old, thievish

Moses Lamos stole my pork, which I had in my barn, for I tracked him." General issue pleaded. Defendant proposed to prove, in mitigation of damages, that before the words used, this plaintiff had been in the habit of associating with persons generally believed to be thieves, and that the plaintiff knew this. The court rejected the evidence, but said that evidence as to the plaintiff's general character for stealing was admissible. Verdict for the plaintiff. Motion for a new trial.

I. Bartlett, for the plaintiff.

Christie, contra.

PARKER, J. The ruling of the court, by which the defendant was precluded from introducing evidence to show that the plaintiff had been in the habit of harboring persons reputed to be thieves, and that he knew they were so reputed, was correct.

If such had been the fact, the plaintiff's general reputation must be bad, and the defendant may have the full benefit of it upon the general inquiry; but evidence of particular facts, not immediately connected with the charge, such as who have and have not been inmates with the plaintiff, and the reputation of those persons, he can not be supposed to have come prepared to show in this suit. In *East of Leicester v. Walter*, 2 Camp. 251, evidence was admitted to prove that there was a general suspicion of the plaintiff's character and habits, and that it was generally rumored that such a charge had been brought against him. And in ——— v. *Moor*, 1 Mau. & Sel. 284, the defendant was permitted to inquire whether there were not reports that the plaintiff had been guilty of similar practices.

Evidence of a similar nature was admitted in *Hyde v. Bailey*, 3 Conn. 466, and in *Treat v. Browning*, 4 Id. 408 [10 Am. Dec. 156]; in the last case, however, only as evidence of character in relation to the subject-matter of the charge. These decisions have been questioned in subsequent cases, and it may well deserve consideration how far even the latter can be supported: *Gilman v. Lowell*, 8 Wend. 579; *Inman v. Foster*, Id. 602; *Mapes v. Weeks*, 4 Id. 659; *Matson v. Buck*, 5 Cow. 499; *Root v. King*, 7 Id. 613-631.

However this may be, authorities are numerous to prove that the defendant is not confined to evidence of character founded upon matters of the same nature as that specified in the charge, as, for instance, to evidence of the plaintiff's character as a thief, whereas in this case the charge was theft; but he may give in evidence the general bad character of the plaintiff, not by

way of justification, but in mitigation of damages, and for this inquiry the plaintiff must stand prepared: 2 Stark. Ev. 369, 878; 1 Phil. Ev. 140 [146]; Stark. on Sland. 409; *Wolcott v. Hall*, 6 Mass. 518 [4 Am. Dec. 173]; *Ross v. Lapham*, 14 Id. 1275; *Bodwell v. Swan and wife*, 3 Pick. 376; *Paddock v. Salisbury*, 2 Cow. 811.

The principle upon which the decisions proceed is, that a person of disparaged fame is not entitled to the same measure of damages, for any particular charge calculated to effect reputation, as a person whose character was previously unblemished; because a character of the first description is not susceptible of the same degree of injury as the other, or may perhaps be "so bad as to be incapable of receiving injury."

We see no objection to this principle, and as the defendant was precluded from introducing evidence of bad character generally, there must be a new trial.

PLAINTIFF'S CHARACTER AS EVIDENCE IN SLANDER: *Anthony v. Stephens*, 13 Am. Dec. 497, and note.

GENERAL REPORTS IN MITIGATION OF DAMAGES IN SLANDER: *Anthony v. Stephens*, *supra*, and note.

EVIDENCE IN MITIGATION OF DAMAGES IN SLANDER: *Wormouth v. Cramer*, 20 Id. 706; *Alderman v. French*, 11 Id. 114, and note.

PUTNEY v. DAY.

[6 NEW HAMPSHIRE, 430.]

A CONTRACT OF SALE OF TREES growing upon land is within the statute of frauds, and should be in writing.

A LICENSE which in its nature amounts to an interest in land, must be in writing.

PAROL LICENSE EXECUTED can not be revoked.

PAROL LICENSE TO BE EXERCISED UPON LAND, and granted upon a good consideration, is valid, and can not be revoked.

LICENSE WITHOUT CONSIDERATION may be revoked.

PAROL LICENSE TO TAKE TREES from one's land as long as the licensee chooses, is revoked by the death of the licensor.

TRESPASS for breaking and entering the plaintiff's close, and cutting and carrying away forty pine trees. Verdict for the plaintiff, subject to the opinion of the court on a case containing the following facts: In 1815, Lyman and Putney being the owners of the *locus in quo*, the former leased his half to the latter for fourteen years. In 1825, Putney, by a contract in writing, sold all the pine timber on a part of the lot to the

Days, who, by the contract, were to have three years and four months to cut and haul the timber. Lyman died in September, 1829, and his interest in the *locus in quo* descended to his daughter, who, in December following, conveyed the same to one of the plaintiffs. Amos Putney died in March, 1830, and the plaintiffs are his heirs. In March, 1832, the defendants entered and cut the trees mentioned. They offered to prove that in December, 1829, Amos Putney gave them verbally as long a time as they might choose to have to cut and carry away the timber, but this evidence was rejected.

S. Smith, for the plaintiffs.

Tappan, *contra*.

By Court, RICHARDSON, C. J. The question is, whether a verbal license, given by Amos Putney to the defendants, in December, 1828, could avail them as a defense under the circumstances of this case. If it could, the verdict must be set aside, and the evidence admitted. If it could not, the verdict is right, and the plaintiffs entitled to judgment.

The contract to sell the trees, in this case, was within the statute of frauds, and it was essential that it should be in writing: 1 Laws, 535; 2 Stark. Ev. 598; 6 East, 602; 2 Bos. & Pul. 452; 2 Taunt. 38; 7 Johns. 205. Under certain circumstances, a sale of a growing crop or of timber is not within the statute: 9 Barn. & Cress. 561; 5 Id. 829; 11 East, 362; 2 Mau. & Sel. 204. But in this case the contract was clearly within the statute. In *Pease v. Gibson*, 6 Greenl. 81, a sale of all the timber trees standing on a lot of land, the purchaser to have two years to take the timber, was held to be a sale only of the timber taken within the two years. And this decision seems to us to be reasonable. For otherwise the purchaser might keep the timber incumbering the land as long as he pleased.

The license then given by Amos Putney, in December, 1828, was without any consideration to sustain it. A license which, in its nature, amounts to a grant of an interest in land, must be in writing: 11 Mass. 533. But a parol license executed can not be revoked: 8 East, 308; 4 Pick. 368; 7 Bing. 682. And a parol license to be exercised upon land and granted upon a good consideration, is valid, and can not be revoked: 7 Taunt. 374. But a license without consideration may be revoked: 1 Cow. 243, and it is clear that the license given by Amos Putney, in December, 1828, expired with his life: 6 N. H. 11; 2 Mason, 244.

It is clear, then, that the evidence offered by the defendants was rightly rejected, and there must be Judgment on the verdict.

PAROL LICENSE.—This subject is considered in the notes to *Rick v. Kelly*, 10 Am. Dec. 38; *Berick v. Kern*, 16 Id. 502; *Gilmore v. Wilbur*, 22 Id. 410.

MERRIAM v. WILKINS.

[6 NEW HAMPSHIRE, 432.]

A NEW PROMISE MADE AFTER AN INFANT'S MAJORITY, but after the action has been commenced, will not support the action.

ASSUMPSIT for goods sold and delivered. The cause was submitted on the following facts, a verdict having been taken for the plaintiffs: The goods were sold and delivered by the plaintiffs to the defendants, one of whom, Erastus Wilkins, was an infant at the time; but after his arriving at age, after the action had been commenced, he said that he would not take advantage of his infancy.

Hutchins, for the plaintiffs.

Bartlett and Peaslee, contra.

By Court, **RICHARDSON, C. J.** We are of opinion that this action can not be sustained against Erastus Wilkins. In *Wright v. Steele*, 2 N. H. 51, it was decided that a promise made after the commencement of the action, and after the minor arrived at the age of twenty-one years, might be considered as a waiver of the defense of infancy, so that the contract might be considered as valid from the beginning. But this view is sustained by no other authority, and can not be reconciled with what must now be considered as settled principles of law on this subject.

It was supposed in that case there was a close analogy between the case of a debt taken out of the statute of limitations by a new promise, and a contract of an infant, ratified by a promise made after he comes of age; and that this analogy was close enough to sustain that decision. But there is, in truth, no analogy between the two cases. In the case of the statute of limitations, the new promise does not create a new cause of action, but shields an old one from the operation of the statute.

But in the case of infancy, there is no cause of action until the contract is ratified after the infant arrives at an age when

the law allows him to bind himself by a contract: *Thornton v. Illingworth*, 2 Barn. & Cress. 824; *Ford v. Phillips*, 1 Pick. 202.

The contract of an infant to pay for goods sold and delivered to him, is, unless the goods are necessities, no foundation for an action. The delivery of the goods may be a moral consideration which will sustain a promise to pay for them, made after he comes of age. But such promise can not relate back, upon any principle with which we are acquainted, so as to make the original contract a good foundation for an action from the beginning. There is no legal cause of action until the contract is ratified.

In this case, the plaintiffs may enter a *nolle prosequi* as to the infant, and take judgment on the verdict against the other defendant.

INFANT'S RATIFICATION OF HIS CONTRACTS.—See the references to considerations of this question in the note to *Benham v. Bishop*, 23 Am. Dec. 360; *Lasson v. Lovejoy*, Id. 528.

PETTINGILL v. RIDEOUT.

[6 NEW HAMPSHIRE, 454.]

ONE FROM WHOM GOODS HAVE BEEN STOLEN MAY MAINTAIN TROVER, before the conviction or acquittal of the person accused of the taking.

TROVER for a horse. The suit was commenced at the December term, 1831, and tried at the September term, 1832, when it appeared that at the February term, 1832, the defendant was convicted of stealing the horse, which was the same taking complained of in this suit. Defendant contended that the action could not be maintained, because it was commenced before the conviction, the civil remedy being merged in the felony, until conviction. The objection was overruled. Verdict for the plaintiff. Motion for new trial, the defendant still insisting that the action had been prematurely brought.

Atherton, for the defendant.

E. Parker, contra.

By Court, RICHARDSON, C. J. It is urged, in this case, that the party injured can maintain no action commenced before the conviction of the offender, because the civil remedy was merged in the felony until the conviction, and did not emerge until after that event, so that in fact there was no cause of action when the suit was commenced. But how the civil rem-

edy can at this day be considered as merged in the felony, counsel has made no attempt to explain; nor does it seem to us to admit of any explanation.

When an assault upon an individual ends in murder, it may be said that the assault is merged in the higher crime of murder, and this is easily understood. So, if a bond be given by one for the contents of a note he gives to another, it is easy to see how the inferior remedy upon the note may be merged in the higher remedy upon the bond. And in the early days of the common law, when the severity of the criminal code left in the case of felony no room for private redress, when not only the life, but the goods, chattels, and lands of the offender were all forfeited, we can very easily understand how the civil remedy was merged in the felony: *Hawkins Pleas of the Crown*, b. 2, c. 49; 4 Bl. 94-98; Co. Lit. 390, 391.

But at this day it is not pretended that the merger lasts beyond the time of judgment in the criminal prosecution. What is it then? Every man is presumed to be innocent until convicted. There is, then, before conviction nothing in which the civil remedy can be merged except a suspicion of felony; and the moment this suspicion is found by a trial to be either well or ill founded, the merger ceases: 12 East, 409; 4 Greenl. 164; 3 Id. 458; 4 N. H. 239; 2 Car. & P. 421; 15 Mass. 331; 2 T. R. 750; Bull. N. P. 32, 78; 1 Lev. 247.

To call a suspension of the civil remedy, till the criminal justice of the state is satisfied, a merger, is, in our opinion, very little, if anything, short of an abuse of language. And in the case of *Crosby v. Leng*, 12 East, 409, the rule that denies private redress until the public justice is satisfied, is placed entirely on grounds of public policy. Not a word is uttered by the court of any merger.

The question then is, Does that rule exist in this state? It has not been actually applied in any case that we can recollect. We are then at liberty to adopt or reject it, according as we may find it adapted or not adapted to the situation and circumstances of this state.

We are by no means satisfied that the rule is of any practical use in any country. But however that may be, we are very well satisfied that the people of this state want no additional stimulants to prosecute offenders. Rogues are almost the only game our people have to pursue, and they are by no means backward in that chase. We do not believe that if the civil action and

the criminal prosecution go forward together, the public justice will sustain any detriment whatever from that circumstance.

At all events, there seems to us to be no sound reason why the party injured should not commence his action before the conviction or acquittal of the offender. It will be enough if he is compelled to wait for a trial in his cause until the prosecution in behalf of the state is brought to a close. Whether even that is expedient, it will be time enough to settle when the question arises. To compel the injured party to wait until the prosecution for the offense is ended, before he can commence an action, must be, as is very well known, in most cases to deny all remedy.

We are therefore clearly of opinion, that it is no objection to this action that it was commenced before conviction

Judgment on the verdict.

MERGER OF CIVIL INJURY IN CRIMINAL PROSECUTION.—See *Foster v. Tucker*, 14 Am. Dec. 243, and note thereto.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

VARNUM v. CAMP.

[1 GREEN LAW, 336.]

ASSIGNMENT, TO BE VALID BY THE STATUTE OF NEW JERSEY, must be for the equal benefit of all creditors, and must not create any preference; and an assignment which does not comply with these requirements is, in contemplation of law, fraudulent and void.

INSTRUMENT EFFECTUAL, WHERE MADE, to transfer the maker's property there situated, can not have that effect in another state, by whose laws it is declared to be fraudulent and void; hence, an assignment which creates a preference, although valid in New York, where it was made, is ineffectual to transfer property of the assignor, which was at the time of its execution situated in New Jersey.

PROPERTY IN NEW YORK AT THE DATE OF SUCH ASSIGNMENT, and which was legally transferred thereby, can not, on its subsequent removal to New Jersey, be there seized as the property of the assignor.

REPLEVIN tried at the Essex circuit, and a verdict taken for the plaintiff, subject to the opinion of this court on the questions of law arising at the trial. The opinion states the case.

Ogden and Hornblower, for the plaintiff.

Cassedy, Dickerson, and Frelinghuysen, for the defendant.

By COURT. A verdict was in this case taken for the plaintiff subject to the opinion of this court, upon the questions of law arising from the evidence given at the trial.

The action is in replevin for sundry articles of merchandise. Both parties admit that on and before the first day of December, 1828, these articles belonged to William Roy, and were in his possession in a store kept by him at Paterson, in the county of Essex. The defendant, who was sheriff of that county on the seventh of February, 1829, took them in virtue of an

execution sued out on a judgment of that date, in favor of William Swan and James Anderson against William Roy, to whom, as the sheriff alleges, the merchandise then belonged. The plaintiff insists that he, and not Roy, was then the owner, and that he became so on the first day of the preceding December by means of an assignment from Roy, whereby the property was legally transferred to him, and which was, he says, immediately followed by a change of the possession.

The question as to the change of possession may be postponed until we shall have inquired into the validity of the transfer, and will then only become material if the assignment is legal and effectual, for if fraudulent and void, and if thereby no property vested in the plaintiff, the actual possession of the articles by him would not have prevented the seizure and occupation of them by the sheriff.

The validity, operation, and effect of the assignment form the prominent and principal question in the cause.

This instrument was executed in the city of New York, where Varnum and Roy were at the time resident merchants, the latter also carrying on the store at Paterson by the agency of a clerk, and by his own occasional attendance. It bears date December 1, 1828. The object expressed on the face of it is to benefit his creditors and for the payment of his debts. It purports to convey all his estate, real and personal, especially mentioning, among other things, the goods in the store at Paterson, to Joseph B. Varnum, in trust, to defray the expenses attendant upon the execution of the trust, and thereafter to apply the proceeds and avails, by taking up and paying certain specified notes indorsed by John Laroque, and any other notes, if any should be drawn by Roy and indorsed by Laroque, and against which notes Varnum had, by a bond of the same date, engaged to indemnify Laroque, who had lent his notes and indorsements to Roy for his accommodation; or, in other words, to secure and perform payment out of his estate, to Laroque, a favored creditor, and then to divide among his other creditors, in full or *pro rata*, as the case might be, and to return the surplus, if any, to Roy.

At the outset of our inquiry, I premise that I shall undertake it under a belief there is no actual fraud in any part of the transactions necessary to be examined. I find none, nor any grounds from which, as I apprehend, an inference of such fraud could justly be drawn by a jury. The plaintiff's brief seems indirectly (in a parenthesis) to question whether the judgment

of Swan and Anderson was not by Roy's procurement, or by collusion with him. There is nothing, however, which I can discern in the evidence to support a suspicion of this kind, and they are acknowledged creditors to very nearly the amount of their judgment, in the schedule made by Roy and accepted by Varnum. In the assignment and the matter connected with it, I can discover neither actual nor attempted fraud. The declared purpose, the payment of just debts, was laudable, and a sufficient motive and consideration. Varnum himself was a large creditor, and his individual debt was placed, not in preference but on a footing with others. And in the result it appears probable he will incur a loss beyond the amount of his original debt, whatever may be the termination of the present suit.

It may also be assumed, for so both parties indirectly, if not explicitly admit, that the assignment in New York, where it was made, and where Roy, as already remarked, then resided, is legal and valid, and is effectual to convey and transfer to Varnum all the property mentioned in it, then within the bounds or jurisdiction of that state. I entertain no doubt that such is the settled law there: 2 Kent Com. 420; *Mackie v. Cairns*, 5 Cow. 547 [15 Am. Dec. 477].

By the law of New Jersey, an assignment like the present is, as respects creditors not parties, illegal, invalid, and effectual, to divest the property of the grantor, or to transfer and convey an available interest to the grantee. Our statute enacts, that every conveyance or assignment made by a debtor, of his estate, real or personal, or both, in trust to the assignee or assignees for the creditors of such debtor, shall be made for their equal benefit, in proportion to their several demands, to the net amount that shall come to the hands of the assignee or assignees for distribution, and all preferences of one creditor over the other, or whereby any one or more shall be first paid, or have a greater proportion in respect of his, her, or their claim, than another, shall be deemed fraudulent and void, except mortgage or judgment creditors, when the judgment has not been by confession, for the purpose of preferring creditors: Rev. Law, 674, sec. 1. To make a valid assignment then under the influence of this statute, two things are essential: 1. That it should be for the equal benefit of the creditors, for the statute directs that it shall be so made; and 2. That it creates no preference, for all preferences are declared fraudulent and void, and consequently,

the instrument whereby they are attempted, must be of a like character.

The position of the plaintiff's counsel, "that the statute does not declare assignments not made according to its provisions to be void, but affirms the assignment, declares what shall be the effect of it notwithstanding its provisions, and only makes void so much of it as gives a preference, except to mortgages and judgments," can not be sound. The statute declares how they shall be made that is to say for the equal benefit of the creditors, and not merely that such shall be their effect in what way soever made. An assignment, therefore, made in a manner prohibited, must be invalid. The express denial of preferences, is in truth but an amplification of the antecedent clause of the statute, and without really adding anything to its extent, or perhaps to its force, serves to express in distinct terms the legal effect and operation of that prior clause. It follows then, that were an assignment not made for the equal benefit of the creditors, but whereby a preference is sought to be given to any one not a creditor by mortgage or judgment, over another, is, in contemplation of law, fraudulent and void. However clear, then, it may be of moral turpitude or actual fraud, it can no more, than if thus tainted, prevail against an execution creditor.

In this view of the case, then, the question is presented whether an instrument legal where made, and at the domicile of the maker, and sufficient to transfer his property there, can dispose of his movables situate here, in a manner prohibited by our law, inconsistent with its policy, and declared by it fraudulent and void.

The general principle is fully and unequivocally settled. Personal property has no locality, but is transferable according to the law of the country where the owner is domiciled; and if there is no exception, or no exception which can reach the articles of merchandise now in question, they became by the assignment the property of Varnum, the present plaintiff, and the defense of the sheriff must fail.

But there are exceptions within which the present case will be found, or perhaps, more correctly speaking, the principle carries with it such limitations as to preclude the transfer by the assignment of the property in question, so far at least as respects the claim now fastened on it by the execution of Swan and Anderson. Chancellor Kent, in his commentaries, states the doctrine in these words, *Locus regit actum*, and by the law of nations, every personal contract which is valid where it was

made, is valid everywhere, unless condemned by some positive regulation of the state, or some strong rule of public policy: 3 Kent Com. 48. According, then, to this enlightened jurist, the contract, though valid in New York, is not valid here, if, as I have endeavored to show, it is condemned by a positive statute, and inconsistent with its obvious policy.

In *Holmes v. Remsen*, 20 Johns. 200 [11 Am. Dec. 269], Platt, J., although differing materially from Chancellor Kent in the extent of the general rule of international law, expressly recognizes and adopts the doctrine laid down by the latter in 4 Johns. Ch. 471: "Every country may by positive law regulate, as it pleases, the disposition of personal property found within it, and may prefer its own attaching creditor to any foreign assignee, and no other authority has a right to question the determination." In another place Justice Platt says (*Id.* 265): "It is an established and universal rule, that independent of express municipal law (whereby we are to understand him, when it exists, the subject is to be regulated), personal property of foreigners, dying testate or intestate, has locality. Administration must be governed and distribution made in the country where the property is found; and as to creditors, the *lex rei sitæ* prevails against the law of the domicile in regard to the rule of preferences."

In *Holmes v. Remsen*, 4 Johns. Ch. 471 [8 Am. Dec. 581], Chancellor Kent, while maintaining with his wonted strength an extension of the rule of international law, which he afterwards, in his commentaries, admits is inconsistent with the weight of American authority, 2 Com. 330, steadily qualifies the rule in the manner already shown in another passage just quoted from the latter work. Thus, he says, the true question is, whether it will not be wise, and politic, and just, where no positive law intervenes, and where it is not repugnant to the essential policy and institutions of the country, to adopt the rule which other nations apply to us, and which impairs naught, but promotes general justice. And again, in another place: "Perhaps we may say that no concession ought to be made to foreign interests which would materially disturb the whole order and policy of our internal arrangements. The rule is that *comitas* is to be observed *quatenus sine præjudicio indulgentium fieri potest*." In *Milne v. Moreton*, 6 Binn. 361 [6 Am. Dec. 466], C. J. Tilghman said: "This proposition is true in general, but not to its utmost extent, nor without several exceptions. In one sense, personal property has locality, that is to say, if tangible, it has a place in which it is situated, and if invisible, consisting

of debts, it may be said to be in the place where the debtor resides; and of these circumstances, the most liberal nations have taken advantage by making such property subject to regulations which suit their own convenience." Every country has the right of regulating the transfer of all personal property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure. In the same case, Judge Breckenridge, who was willing to yield greater efficacy than the rest of the court to an assignment under the English bankrupt laws, nevertheless thus speaks: "An interest arising on a contract here, unless there is some law with us to exclude it, follows the person as much as the ownership of a chattel."

The same general doctrine, differing only in terms, is laid down by Justice Story in *Le Roy v. Crowninshield*, 2 Mason, 157, and by Justice Washington in *Ogden v. Saunders*, 12 Wheat. 259. The former says personal contracts are to have the same validity, interpretation, and obligatory force in every other country which they have in the country where they are made, or are to be executed. An exception coeval with the rule itself, and resting on the same foundation, is that no nation is bound to enforce or hold valid any contract which is injurious to its own rights or those of its citizens, or which offends public morals, or violates the public faith. The latter says: "Where it (a contract) is of an immoral character, or contravenes the policy of the nation to whose tribunal the appeal is made, the remedy which the comity of nations affords for enforcing the obligation of contracts, wherever formed, is denied."

Now, in the case before us, the assignment or the duty of the trustee under it, was in part, at the least, to be executed in this state, where, as appears, as already mentioned, a portion of the property proposed to be transferred by it was then situated.

These principles seem to have been reduced to practice in the case of *Ingraham v. Geyer*, 13 Mass. 146 [7 Am. Dec. 132]. B. and R., merchants in Philadelphia, made an assignment of all their effects and credits to certain persons, in trust for such of their creditors as within four months should execute a full release; the surplus to be distributed *pro rata* among their other creditors, and the remainder, if any, to the assignors. The question, the court said, was whether the assignment was valid in Massachusetts, so as to defeat a subsequent attachment of a debt there. They held that such an assignment could not be supported if made in Massachusetts by parties residing or living there, and with a view to be there executed. "And

supposing (they said) the assignment to have legal effect in the state of Pennsylvania, so as to bind the creditors within that state, it does not follow that it is to be received here, to the prejudice of creditors who are our own citizens. It is not required by the comity of nations."

There is another exception or limitation of the general doctrine, well established in the American courts, which bears a strong analogy to the case before us. In cases of intestacy, says Tilghman, C. J., in *Milne v. Moreton*, the property is distributed according to the law of the domicile of the intestate. But yet, so far as concerns creditors, it depends on the law of the country where it is situated. If an Englishman dies and leaves property here, we regulate the order in which his debts shall be paid according to our own law; the residue is distributed according to the law of England. This rule was enforced in *Smith v. The Union Bank of Georgetown*, in the supreme court of the United States: 5 Pet. 518. R. was at his decease domiciliated in Virginia, and owed there a debt on bond, which is there preferred to a debt by simple contract. He was indebted by simple contract, and had personal estate in the city of Washington, where administration was granted, and where the laws of Maryland, which admit no preferences, govern. It was held that the effects in the hands of the administrator, were to be distributed among the creditors according to the laws of Maryland, and not of Virginia. Justice Johnson, in delivering the opinion of the court, made several apposite remarks: "That personal property has no *situs*, seems rather a metaphysical position than a practical and legal truth." "In point of fact it can not be questioned that goods found within the limits of a sovereign's jurisdiction are subject to his laws; it would be an absurdity in terms to affirm the contrary." "It is an acknowledged doctrine that in conflict of rights, those arising under our own laws, if not superseded in point of time, shall take precedence, '*majus jus nostrum quam jus alienum servemus*.' The obligation of the sovereign to enforce his own laws, and to protect his own subjects, is acknowledged to be paramount." "Contracts *contra bonos mores*, or against the policy or laws of a state, will not be enforced in the courts of that state, though lawful in the state in which they are entered into."

The principles on which this exception is sustained, apply with great efficacy to resist the action in the case before us, of the foreign assignment upon the property here.

Thus far I have referred exclusively to American jurists.

Similar doctrine will be found maintained in the English courts. In *Hunter v. Polls*, 4 T. R. 182, Lord Kenyon, for the court of king's bench, said: The only question is, whether or not property in that island (Rhode Island) passed by the assignment (under the bankrupt law) in the same manner as if the owner (the bankrupt) had assigned it by his voluntary act. And that it does so pass can not be doubted, unless there were some positive law of that country to prevent it. Every person having property in a foreign country may dispose of it in this, though, indeed, if there be a law in that country directing a particular mode of conveyance, that must be adopted. In *Sill v. Worswick*, 1 H. Bl. 690, Lord Loughborough, after stating the general doctrine, and maintaining that it gives efficacy to a commission of bankruptcy over the property of the bankrupt out of the jurisdiction of the laws of England, adds: "When I have laid this down, it by no means follows that the commission of a bankrupt has operation in another country against the law of that country. If the law of that country preferred him (a creditor there obtaining payment of his debt) to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided." In *Potter v. Browne*, 5 East, 131, Lord Ellenborough said: "We always import, together with their persons, the existing relations of foreigners as between themselves, according to the laws of their respective countries, except, indeed, where the laws clash with the rights of our own subjects in England, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference."

The same general doctrine has also been maintained in the courts in Scotland. In *Levett v. Levett*, Ferg. Scot. Consist. 633; *Ingraham Eccles*. 366, assuming that the law of the contract is everywhere entitled to obedience from considerations of its equity, yet this, like every other general rule, can not be received without limitation. Wheresoever the foreign law stands opposed to the principles of religion or of morality, or to the municipal institutions established in the country where it is sought to be applied, it must cease to operate. For it is clearly the duty of every state to keep its religion and morals pure, and its institutions entire. In *Edmondstone v. Lockhart*, Id. 168, 397: "In the annunciation of the principle upon which respect to a foreign rule is required, the conditions have al-

ways been added, that this shall be conceded only when no injury shall thereby arise to the country or people to whom the right of jurisdiction belongs, in whatever regards the independence of their own system of law, or the interests of religion, morality, and good order, within the state. It was quite clear that the municipal rule of the law of Scotland could not, according to the principles of international law, be sacrificed, when essential injury to our own system must plainly follow." In *Gordon v. Pye*, Id. 460, it is now held that full effect is to be given to a contract entered into abroad, if the forms and solemnities requisite to its validity in the foreign country have been duly adhibited, although they should be in every respect different from those in use among ourselves. Our deference for the foreign law, or, in other words, the *comitas* we exercise towards it, goes thus far, that when the validity of any deed is in question, as far as form is concerned, we look to what is required for this purpose by the law of the country where it is entered into. If valid there, we give full effect to it; but always under this limitation, that our doing so does not affect our own essential policy or institutions, or the interests of morality in our own country." In p. 466: "It is admitted in every case where the application of the principle of *comitas* is concerned, that when the admission of the foreign law would be clearly inconsistent with the essential policy and institutions of the country where it is proposed to be received, this must create an effectual bar to the extension of the principle to such a case."

It would be interesting to pursue this subject into the writings and disquisitions of the *jurisconsulti* of the continent of Europe, so far as they are within our reach. I shall, however, content myself with a passage from Huberus, who, whatever may be the rank or reputation to which he may be entitled, about which a considerable conflict of opinion has prevailed, has certainly been more frequently cited and more confidently relied on in our courts than any other continental author, and has therefore served more than others as a guide here. He says, vol. 2, b. 1, tit. 3 (4), 3 Dall. 376: "Whatever the laws or judicial proceedings in any place decide as to their subjects, other people allow to have the same effect with them, unless a prejudice or inconvenience would result to them or their laws." (1) 3 Dall. 374: "The place where the contract is entered into is not to be exclusively considered, if the parties had in contemplation another place at the time of the contract; the laws of the latter

will be preferred in the construction of the contract." (2) Id. 375: "The effects of a contract entered into at any place, will be allowed according to the law of that place, in other countries, if no inconvenience results therefrom to the citizens of that other country, with respect to the law which they demand." (3) Id. 375: "If the law of the place in another government is contrary to the law of our state, in which also a contract is made inconsistent with a contract celebrated and made in another place, it is reasonable, in such case, that we should observe our own law rather than a foreign law."

These doctrines are in entire harmony with the principles contained in the cases to which I have heretofore adverted.

A brief review of the cases cited by the plaintiff's counsel will serve to develop and illustrate further these doctrines, and afford an opportunity to explain and remove some objections which at first sight may seem to arise to them, or to their application.

Succession to personal property, as in *Bruce v. Bruce*, 2 Bos. & Pul. 230, note, and in *Benefide v. Johnson*, 3 Ves. 198, which is universally regulated by the law of the domicile of the owner at his decease, stands completely distinguished from the subject now under consideration. The country or government in which the property is situated, can have no interest in the mere distribution, and will therefore exercise no control over the property, farther than the rights or claims of creditors are concerned, and in that respect, as we have seen, the *lex rei sitæ*, and not the *lex domicilii*, is to prevail. In *Dixon v. Ramsay*, 3 Cranch, 319, the question was, whether an executor who had obtained letters testamentary in England, could maintain a suit in the district of Columbia without letters testamentary there. The court held that no man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules presented by the laws of that country. And although all rights to personal property are to be regulated by the laws of the country in which the testator lived, yet the suits for those rights must be governed by the laws of that country in which the tribunal is placed. The substance of the decision of the court is, that whatever may be the right of a party, his remedy must conform to the law of the forum. The disposition of the personal property and the rights of the legatees, are to depend on the law of the domicile; with it the testator is presumed to be conversant, and by it, to regulate his bounty, and his manner of disposal. The rights to the property are therefore to be thereby governed.

The language of the court is to be taken in reference to the question before them. They were not called to express any opinion on the validity and effect of a disposition proposed to be made by a foreign testator, in a manner prohibited by the laws of the country where the property is situate. In *Dessebats v. Berquier*, 1 Binn. 336 [2 Am. Dec. 448], Theil, the supposed testator, when he made the instrument preferred as a will, was a resident of St. Domingo, and a subject of France, and by the laws of that island, the instrument was not a will. It was very properly held that it could not therefore be proved or supported as a will in Pennsylvania, although if made there, and the testator had there been a citizen, the property would have passed by it. As the will was void where it was made, and where the maker of it resided, the court held it void everywhere. As he died intestate, by the law of the place where he was domiciled, he must be regarded elsewhere in the same character. There is nothing in the decision or the observations of the court, which serves to show they would have held themselves bound to maintain a disposition which a foreign testator might have sought, by his will, if such disposition had been forbidden or declared fraudulent and void, by the law of Pennsylvania; because such disposition might be admissible or consistent with public policy, where the testator resided. The remark by Lord Ellenborough, in *Potter v. Brown*, 5 East. 131, that it is every day's experience to recognize the laws of foreign nations as binding on personal property, was made without any reference to the result of a conflict of laws, as is evident from the remarks which he makes immediately afterwards, and which I have heretofore mentioned.

The case of *Greenwood v. Curtis*, 6 Mass. 358 [4 Am. Dec. 145], can furnish no support for the plaintiff's claim. The recovery in that case was not on the note or promise for the delivery of slaves, for the counts founded thereon the court laid out of the case, but upon the third count, on an account stated, the consideration of which the court say was the sale of a cargo of merchandise, which therefore involved nothing immoral or illegal. In discussing the case, the court state this general doctrine: "By the common law, upon principles of national comity, a contract made in a foreign place and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this state, although such contract may not be valid by our laws, or even may be prohibited to our citizens." The qualification which the

court here gave to the rule shows that it can not be brought to bear on the facts before us. And the exceptions which the court immediately make to the rule, prove the result more distinctly, and serve to show that the views of the court accord with the general doctrine which I have stated. A contract for the sale and delivery of merchandise, in a state where such sale is not prohibited, may be sued, the court say, in another state where such merchandise can not be lawfully imported. But if the delivery was to be in a state where the importation was interdicted, the contract could not be sued in the interdicting state, because the giving of legal effect to such a contract would be repugnant to its rights and interest. Upon the same principle, it seems to me, the courts of a state ought not to give legal effect to a contract or transfer of property which is repugnant to the express law of the state and to its obvious policy.

The case of *Chartres v. Cairns*, in the supreme court of Louisiana, found in a note to 5 Cow. 578, seems more nearly in point than the other cases to which we have been referred. The court gave efficacy over a subsequent attachment to an assignment made in New York, where the parties to it resided, and where they supposed it to be valid, although by the laws of Louisiana, on the subject of insolvency, it would have been null and void by reason of a provision or reservation contained in it for the benefit of the grantor. This case is but shortly stated, and we have not the views and reasoning of the court so distinctly as could be wished. Much reliance seems to have been placed on the fact that both parties interested in the suit, the attaching creditor and the debtor, the assignor, were citizens of New York, and that no citizen of Louisiana was affected. Whatever respect, then, may be justly due and yielded to the highly respectable tribunal by whom the decision was made, I am unable to yield a prevailing weight to their decision, which seems to me, so far as it is analogous to the case before us, not required by and inconsistent with the sound principles of international law. And, moreover, this decision appears to me in no inconsiderable degree to depart from other cases said to have been decided in the same court, and cited Livermore's Dissertations, 137. It is to be regretted that we have not access to the volumes of the Louisiana reports from which these cases are cited.

The plaintiff's counsel in his argument made certain concessions under the weight and influence on his mind of the legal doctrines which ought not to be overlooked, although if incor-

rectly made, I should be unwilling in any wise to prejudice his cause by them. "I admit," said he, "a foreign debtor can not fraudulently put his property here out of the reach of our process any more than a domestic debtor can; but a foreign debtor has precisely the same control over his property here as a domestic debtor has."

Now, a transfer of this nature by a domestic debtor, would undoubtedly be fraudulent and void according to the very terms of the statute, and if a foreign debtor can not fraudulently put his property out of the reach of our process, any more than the domestic debtor, how can the merchandise now in question be out of the reach of the execution. And if a foreign debtor has precisely the same control over his property here as a domestic debtor, how can he make such an assignment as, in the hands of the domestic debtor, would be fraudulent and void?

While, then, I am prepared to give full weight to the principles which sustain foreign contracts and foreign transfers, and especially when made in the other states of this Union, whether it be on the ground of comity, as some place it, or of international law, as others choose to call it, I do not feel authorized to give validity to this assignment, which would effect a transfer of property under the control of our laws, in violation of their policy, in hostility with their provisions, and which they declare to be fraudulent and void.

I have hitherto, to avoid complexity and confusion, spoken of the whole of these articles of merchandise as if falling, as I hope I have shown part of them unquestionably does, under the operation of the legal doctrines which I have suggested. It is necessary, however, that a discrimination should be made. A part of the merchandise seized by the sheriff was sent to the store in Paterson by the plaintiff after the assignment, and had never belonged to Roy. Another part was also sent there after the assignment, which had belonged to him, and was in his store at New York, and was comprehended in the assignment, and of which a valid transfer was thereby made. Both these parts, then, being at the levy of the execution clearly the property of Varnum, were improperly taken by the sheriff. They amount, according to the testimony, to one half of the property or thereabout.

It thus appears that the plaintiff in replevin is entitled to a portion of the articles replevied, and the defendant is entitled to the residue. And the judgment should be so rendered as to secure their respective rights

But as the verdict does not distinguish the goods belonging to the plaintiff from those which do not belong to him according to this decision, there must be a *venire de novo*, and one is accordingly ordered.

In the case of *Moore v. Bonnell*, 2 Vroom, 80, the principal case was reviewed at some length, and its doctrine affirmed. In that case it was held that an assignment made in New York, which gave a preference to creditors, but which was legal at the place of the assignor's domicile, could not dispose of movable property in New Jersey. But it was also decided that an attaching creditor, being a resident of New York, where the assignment in question was made, would not be permitted to impeach it in the courts of New Jersey, on the score of its incompatibility with the laws of the latter state. In *Garrison v. Brown*, 2 Dutch. 425, the principal case was cited as authority for the position that an assignment which made an unequal distribution of the assignor's property among his creditors, was inoperative and void under the statute of New Jersey. Potts, J., delivering the opinion of the court, distinguished that case from the principal case, and said: "I do not understand the court, in the case of *Varnum v. Camp*, to hold that preferences made in contemplation of an assignment will avoid the deed. * * * This was the case of a preference given in the assignment itself. The other question, as to what would be the effect of preferences made before the assignment, and not incorporated in the instrument, but made in view of the assignment, was not before the court at all." And the court in that case decided that preferences not made in and by the assignment itself, although they might be fraudulent and void under the statute, would not invalidate the assignment. And they construed the provision of the statute making all preferences fraudulent and void, to mean all preferences made in and by the assignment itself.

In *Bentley v. Whittemore*, 4 C. E. Green, 462, it was held that a voluntary assignment made by a non-resident debtor, which is valid by the law of the place where made, can not be impeached in this state, with regard to property situated here, in behalf of non-resident creditors, on the ground that such assignment is incompatible with the statute of this state. And the court decided that the rule applies to realty as well as to personal estate, provided the form of assignment is such as is required by the land regulations of this state. In delivering the opinion of the court in that case, Beasley, C. J., said: "In *Varnum v. Camp*, the ground of decision invalidating a foreign assignment which created preferences, was, that we had established in this state a local policy under which our citizens had a right to be protected. It was admitted that, as a general rule, a transfer of property, valid where made, would be effectual everywhere; but it was also deemed equally clear, that the recognized exception to the rule was, that it was not to be enforced to the manifest injury of our own citizens. A state can not be required, thus it was argued, by any of the obligations of comity, to give up its own system, and substitute in lieu of it any part of the social arrangement of a foreign jurisdiction. This limitation, as well as the rule itself, is firmly established as a part of the international law. But upon what principle is it that the citizen of another state can ask us to refuse to recognize the validity of an assignment made in the state of New York, and in conformity to her laws? Upon what plea, consistent with comity, under such circumstances, are the authorities of this government to repudiate a transaction valid by the laws of a sister state? If the question touched one of our own

citizens, we could vindicate our rejection of such transaction on the ground of our statute, passed legitimately, for the special regulation of the affairs of such citizen. But if such rejection relates to the citizen of another state, how is such a line of conduct to be justified? * * * The true rule of law and public policy is this: That a voluntary assignment, made abroad, inconsistent, in substantial respects, with our statute, should not be put in execution here to the detriment of our citizens, but that, for all other purposes, if valid by the *lex loci*, it should be carried fully into effect."

It was decided in *Frazier v. Fredericks*, 4 Zab. 162, that an assignment made in Pennsylvania, in strict accordance with the statute of New Jersey, which forbids all preferences of one creditor over another, was effectual to transfer property of the assignor situated in New Jersey. Green, C. J., delivering the opinion in that case, said: "The case, therefore, does not fall within the objection which prevailed in *Varnum v. Camp*, that the contract was in violation of a statute of this state, and in contravention of its obvious policy."

PREFERENCE TO CREDITORS.—It was decided in the following cases that a debtor may lawfully prefer one creditor to another: *Bufum v. Green*, 20 Am. Dec. 562; *Mackie v. Cairns*, 15 Id. 477; *Wilkes v. Ferris*, 4 Id. 364.

STATE v. COOPER.

[1 GREEN LAW, 361.]

PERSON WHO, IN COMMITTING A FELONY, UNDESIGNEDLY KILLS ANOTHER, is guilty of murder, especially if death was a probable consequence of his act.

NO MAN CAN BE BROUGHT INTO JEOPARDY of his life more than once for the same offense.

WHEN ONE FELONY BECOMES AN INGREDIENT OF A SUPERIOR ONE, the defendant can not be convicted of both offenses.

PRISONER WHO HAS BEEN CONVICTED OF ARSON can not afterwards be tried on an indictment for murder for the commission of the same arson, where the statute imposes the penalties of murder for such arson.

DEFENDANT CAN NOT BE CONVICTED FOR TWO DISTINCT FELONIES growing out of the same identical act, where one is a necessary ingredient in the other; and if the state prosecutes the lesser offense to a conviction, such conviction will be a bar to an indictment for the higher offense.

INDICTMENT for murder, to which the defendant pleaded *autrefois convict*. This plea was overruled by the court below, and the defendant was convicted, upon which an appeal was taken to this court. The opinion states the case.

Miller, for the state.

Ford and Brown, for the prisoner.

DRAKE, J. At a court of general quarter sessions of the peace, holden at Morristown, in and for the county of Morris, in the term of July, 1830, the grand jury presented an indictment

against Samuel Cooper as principal, and two other persons as accessaries, for the willfully and maliciously burning of the dwelling-house of one Ralph Smith, situate in the township of Hanover, in the said county; and at the same term, presented another bill of indictment against the said Samuel Cooper, charging the crime of arson in burning the same dwelling-house of said Smith, "and that one Joseph Hopper, in the said dwelling-house then and there being, before, at, and during the said burning, was then and there, by reason and means of the said burning, so committed and done by the said Samuel Cooper in manner aforesaid, mortally burned and killed, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Samuel Cooper, the said Joseph Hopper, in manner and form aforesaid, feloniously, willfully, and of malice aforethought, did kill and murder, against the form of the statute," etc.

At the court of oyer and terminer held in September, 1830, the indictment for arson was called on and tried, and the defendant, Samuel Cooper, was convicted thereof. The indictment for murder was then moved, whereupon the defendant pleaded in bar the conviction of the arson as a former conviction of the same offense. To which the public prosecutor demurred. The court of oyer and terminer overruled the plea. But from some peculiar circumstances it was thought advisable by the court to suspend further proceedings until the opinion of this court could be obtained, as to the validity of the plea.

It is a well-established principle of the common law, that if a person, whilst doing, or attempting to do, another act, undesignedly kill a man, if the act done or attempted were a felony, the killing is murder; especially if death were a probable consequence of the act. With respect to some of the higher grade of felonies, as arson, burglary, etc., the legislature of New Jersey have, in Rev. Laws, p. 262, sec. 66, enacted, that if "the death of any one shall ensue from the committing, or attempt to commit, any such crime or act as aforesaid," "such person or persons so killing as aforesaid, shall be adjudged to be guilty of murder and shall suffer death."

It is also a maxim of the common law, that "no man is to be brought into jeopardy of his life more than once for the same offense." The constitution of New Jersey adopts and declares this important principle in this form. "Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb." Our courts of justice would have recognized it, and acted upon it, as one of the most valuable principles of the common law,

without any constitutional provision. But the framers of our constitution have thought it worthy of especial notice. And all who are conversant with courts of justice, and the proceedings in them, must be satisfied that this great principle forms one of the strong bulwarks of liberty; and that if it be prostrated, every citizen would become liable, if guilty of an offense, to the unnecessary costs and vexation of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from repeated trials.

Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*. The writers on the subject concur in stating that these pleas "must be upon a prosecution for the same identical act and crime:" 3 Bl. Com. 336; Ch. C. Law, vol. 1, pp. 452, 462. But, says Chitty, p. 455: "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one would show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge upon an indictment for manslaughter upon the same person, because the latter charge was included in the former; and if it had so appeared on the trial, the defendant might have been convicted of the inferior offense; and on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime, he could not be guilty of the same fact, with the addition of malice and design."

A first inquiry, then, in this case will be, whether there is such identity in these offenses, that according to the rule laid down, and the spirit which pervades the administration of criminal justice, they shall be considered the same for the purposes of this plea. At first view, it appears as if there were two crimes distinctly indictable and punishable. But our sense of justice is shocked by the idea, that a man shall be convicted and punished for the arson, with that measure of punishment which the laws mete out to those guilty of that crime; and that afterwards, for a perfectly accidental and involuntary killing, he shall be liable to the same punishment of death which is inflicted on the willful and malicious murderer. In the case before us, the killing was a simple consequence of the burning, and there is no pretense that it was, in point of fact, intentional. The law makes a man answerable for even the unexpected consequences of his crimes, and for this purpose, imputes the intention to produce the consequence as well as the original act. But to

constitute a crime, there must be an act of the will, and imputed intent must have real intent as its basis; not to accomplish the precise result, but to do something. Some act of commission or omission lies at the foundation of every crime. And that a simple consequence of an act should be severed from the act itself, and possess independently all the necessary ingredients of crime, is a violation of sound philosophy, and, as I think, of law. In this case, the killing, disconnected with the arson, is but involuntary homicide. Connected with the arson, the law awards to it the name and penalties of murder. Had the law called it by some other name, as, for instance, an aggravated arson, the propriety of prosecuting but one crime would have been more striking. Yet names can not alter the substance of things. If the whole offense, in the eye of reason and philosophy, is one (and it requires the whole of it to constitute murder), we ought not to presume that the legislature meant to punish it as two. And, indeed, the power of the legislature to subdivide offenses must be restrained by the constitutional provision which I have noticed; otherwise that provision may be evaded at pleasure. In this case, the arson is a necessary constituent of the murder; and if it do not, to all purposes, lose its separate existence, yet it appears to me that it does so far, that it ought not to be tried and punished as a distinct offense. The indictment charges the arson, and necessarily must do so, and yet it is not on that account objectionable on the score of duplicity. This indicates the proper practice in such cases, which, as I conceive, is to indict and try for the higher crime, and if the part of the offense which is peculiar to that is not proved, and all that is necessary to constitute the inferior one is, that the verdict should convict of the inferior felony, and acquit as to the residue of the charge.

If the defendant could be tried and punished for both felonies, the record of conviction of the inferior offense would be good evidence to support that part of the second indictment, and yet we search in vain for any such principle in treatises upon the law of evidence. A strong proof that when one felony becomes an ingredient of a superior one, the defendant can not be tried and convicted of both offenses.

In the foregoing remarks, quoted from Chitty's Criminal Law, with reference to a former acquittal, the author treats the facts which constitute the crime of manslaughter as component parts of the crime of murder, and says, that if innocent of those, "he could not be guilty of the same, with the addition of malice and

design." The same reasoning would lead us to the conclusion that, had the prisoner at the bar been acquitted on the indictment for arson, it would have been conclusive of his innocence of that component part of the crime laid in this indictment, and would have necessarily barred a conviction under it.

It is no answer to this, that "an acquittal upon an indictment for felony is no bar to an indictment for a misdemeanor, and *e converso*:" Arch. 52; 2 Hawk. b. 2, c. 35, sec. 5; Chit. 456. The latter writer gives one reason why an acquittal of the felony should not bar the prosecution for a misdemeanor, because "a felony, or larceny, can not be modified on the trial into a trespass, or misdemeanor." And an acquittal upon an indictment for a misdemeanor, grounded upon facts constituting component parts of a felony, does not operate as a finding upon those facts, for the acquittal was necessary in point of law, the misdemeanor being merged in the felony. And therefore the defendant, in either of the above cases, could not be considered as legally in jeopardy on the first trial.

If, in committing a misdemeanor, a man involuntarily commit a felony, the misdemeanor is merged in the felony. By an English statute, it is a misdemeanor for a man to burn his own dwelling-house willfully. The burning of that of another person is a felony. John Isaac was indicted for a misdemeanor in having set fire to and burned a house in his own occupation. On the trial before Justice Buller, the counsel for the prosecution opened, that the charge to be proved against the defendant was, "that he willfully set on fire his own house in order to defraud the Phoenix Fire Insurance office; and that, in fact, his own and several other persons' houses adjoining were burnt down." Upon which Buller, J., said, that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances, the prisoner was guilty, if at all, of felony; the misdemeanor being merged, and he could not be convicted on this indictment; and therefore directed an acquittal:" East Cr. Law, 1031.

"It is indeed," says Chitty, "generally laid down that an acquittal of burglary will not prejudice an indictment for larceny, or *vice versa*." The writer qualifies the first part of this proposition by adding, that "this must be understood of those cases in which the former charge did not necessarily include the latter. But he leaves the case of an acquittal of larceny, not affecting an indictment for burglary, without further notice. He refers to 2 Hale, 245, 246, and Hawk. b. 2, c. 35, sec. 5.

Hawkins says: "It is clear that an acquittal of one felony is no manner of bar to a prosecution for another, in substance different, whether committed before or at the same time with that of which he is acquitted; and therefore, if a man commit a burglary and steal the goods of A. and B., and be indicted for the burglary and stealing the goods of A. and be acquitted, it hath been adjudged that he can not plead such acquittal to an indictment for stealing the goods of B. But it seems agreed, that he may plead it to the second indictment for the burglary." This was ruled in *Turner's case*, Kelsyng, 30. But the latter principle has since been denied to be law by Justice Buller in the case of *Vandercom and Abbott*, 2 East Cr. Law, 519, and upon the ground that if there had been an indictment for burglary and stealing the goods of B., it would be a mistake to suppose any part of the offense to have been passed upon (sec. 521), and that therefore the acquittal would be no bar. None of the cases that I have consulted authorize the principle of the text in its full extent. If a man break the house of A. in the night-time, and steal his goods, and upon an indictment for burglary and stealing those goods he be acquitted, it would be a bar to a subsequent prosecution for the larceny. So I consider, that if he be indicted for the simple larceny, and acquitted, he can not afterwards be convicted, upon an indictment for the burglary and larceny, of either offense. According to the reasoning adopted in the case of *Vandercom and Abbott*, he may be convicted of the burglary, if the indictment lay it with intent to steal, for then there is nothing inconsistent with the former acquittal.

In the case of a robbery committed in one county and the goods carried into another, if an indictment be found in the latter county, and an acquittal, it is said that it will not prejudice an indictment for robbery in the first. If this be law, it is placed upon reasons which show it not to have any operation on the point now under discussion: 1 Chit. 456. But it is denied to be law, and I think upon conclusive reasons, in Hawkins' Pleas of the Crown, b. 2, c. 35, sec. 4.

I have so far considered the case of a plea of former acquittal, because it depends upon the same principle of that of *autrefois convict*, and the writers are more full in their notice of it than of the latter; and it is a general rule that in cases where an acquittal upon the first indictment would bar a second, a conviction on the first would have the same effect.

The defendant has been convicted of the crime of arson. He has pleaded that conviction in bar of the indictment for mur-

der. What effect shall that plea have upon this prosecution? If I am right in supposing that the defendant can not be convicted and punished for two distinct felonies, growing out of the same identical act, and where one is a necessary ingredient in the other, and the state has selected and prosecuted one to conviction, it appears to present a proper case to interpose the benign principle, that a man shall not be twice put in jeopardy for the same cause, in favor of the life of the defendant.

Judge Blackstone, in his Commentaries, says, that "a conviction of manslaughter, or an appeal or an indictment, is a bar, even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offenses differ in color and degree." This is well established: 4 Co. 45, 46; 2 Hale, 246; Arch. 52; Fost. Cr. Law, 329; Hawk., b. 2, c. 36, sec. 10. And in the case of Robert M. Goodwin, who was indicted for manslaughter, and subsequently for murder, Colden (mayor) fully recognizes the same principle, where he says: "If we were to try the prisoner on the indictment for manslaughter, unquestionably we should put an end to the prosecution for murder."

If in civil cases the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions. Under the numerous British statutes imposing severe penalties, and even taking away the benefit of clergy from larcenies perpetrated under certain specified circumstances, it is the practice to indict the crime, with all its aggravations under the statute, and if the aggravating circumstances are not proved, to convict of the simple larceny only. I have met with no instance on the part of the crown, after indicting for a simple larceny, and establishing that, to proceed, by another indictment, to establish the higher offense. The case of *Rex v. Smith*, 3 Car. & P. 412, cited in 14 Eng. C. L. R. 374, and the *Commonwealth v. Cunningham*, 13 Mass. 245, are authorities against such a practice. And I am satisfied that a conviction of larceny would be a good bar to a prosecution for burglary and stealing the same goods, whatever might be its effect upon an indictment for burglary with intent to steal. As to which see 7 Serg. & R. 491.

I consider the present case as not affected by those where the first indictment was insufficient, and where a train of decisions has established that the criminal was never legally in jeopardy from the first prosecution: 4 Co. 44, 45; Hawk. b. 2,

c. 36, sec. 15; 1 Johns. 77. Here is no defect in the first indictment. It is a case where the state has thought proper to prosecute the offense in its mildest form; and it is better that the residue of the offense go unpunished, than by sustaining a second indictment to sanction a practice which might be rendered an instrument of oppression to the citizen.

TWICE IN JEOPARDY.—No man can be twice put in jeopardy of his life for the same offense: *State v. McKee*, 21 Am. Dec. 499. See also note to that case, 505, for a discussion of the meaning of the expression "in jeopardy."

TWO INDICTMENTS FOR SAME OFFENSE.—In *State v. Lewis*, 11 Am. Dec. 741, it was decided that where two indictments for a felonious taking of goods were found against a prisoner, one charging him with burglary and larceny, and the other with robbery, and under the first indictment he was convicted of larceny, he could not be tried upon the second indictment.

MERGER IN CRIMINAL CASES.—The principal case falls within the class in which it is claimed that a prior conviction is for a part of the same crime for which the prisoner is again put on his trial, and therefore that the former conviction is a merger, and precludes any further conviction. The authorities on the subject are referred to in *Freeman on Judgments*, sec. 225, 3d ed.; and 1 Whart. Crim. Law, secs. 464, 465. The principal case pushes the doctrine to its utmost limit.

PIERSON v. GLEAN.

[2 GREEN LAW, 36.]

REQUEST TO ABATE NUISANCE MUST BE MADE to him who did not erect such nuisance, before an action can be maintained against him for continuing it.

TRESPASS on the case. The opinion states the case.

Dodd, for the plaintiff.

Gifford, for the defendant.

HORNELLOWER, C. J. The declaration in this case contains two counts: 1. That the plaintiff was lawfully seised and possessed on the first day of April, 1831, of certain lands, in and through which a stream of water had always been accustomed to run and flow; that the defendant, on the said first day of April, 1831, and from that time continually, afterwards maintained and kept up a mill-dam across the said stream, and thereby caused the waters of the said stream to overflow and drown the plaintiff's land. The second count is like the first, except that it alleges a possession only, and not a seisin in the plaintiff.

To this declaration the defendant has put in three pleas: 1. The general issue. 2. Protesting that he never erected or

unlawfully maintained the dam. The defendant says that prior to the twenty-sixth July, 1830, he had no title or possession; that on that day he became seised and possessed of the said dam; since which neither the plaintiff, nor any other person, for him or in his behalf, ever requested the defendant to reform or remove the said dam, and concludes with a verification. 3. That the mill-dam was erected, kept up, and maintained before the twenty-sixth July, 1830, previous to which day the defendant had no title, possession, or interest in the said dam; that on that day the defendant became seised and possessed in fee, and has never since been requested, etc.

To the second and third pleas there is a general demurrer and joinder.

The only question presented to the court upon the pleadings in this case is, whether an action for continuing a nuisance will lie against him who did not erect it, before any request made to him to remove or abate the injury. The plaintiff's declaration is not for erecting, but for maintaining and keeping up the dam. The defendant says the dam was erected before he became seised or possessed of the premises, and that the plaintiff did not, at any time before the commencement of the action, request him to reform or remove the injury complained of. This allegation is fully admitted by the general demurrer.

The law, as settled in *Penruddock's case*, 5 Co. 101, has never, I believe, been seriously questioned since. In that case it was resolved, that though the continuance of a nuisance by the feoffee was a new wrong, yet a *quod permittat* would not lie against him without a request made, etc. Lord C. J. Willes, in *Winsmore v. Greenbank*, Willes, 583, speaking of the distinction between the beginning and the continuance of a nuisance, by building a house that hangs over or damages another, refers to *Penruddock's case*, says the law is certainly so, and the reason obvious. Mr. Chitty, in his treatise on pleading, 1 vol. 376, says it is necessary to state a request in a declaration for continuing a nuisance erected by another: see 2 Chit. Pl. 334, note c. In the case of *Salmon v. Bensley*, Ry. and M. 189; 21 Eng. C. L. R. 730; 2 Saund. on Ev. and Pl. 690, the same doctrine is admitted by Abbott, Lord C. J., though he held that a person who takes premises upon which a nuisance exists, and continues it, takes them subject to all the restrictions imposed upon his predecessors by the receipt of such a notice as had in that case been served upon the preceding occupant.

As well, then, upon the good sense and common justice of

the case, as upon the ground of venerable and unquestioned authorities, I am of opinion that the demurrer ought to be overruled.

Judgment for defendant on demurrer.

In the case of the *Morris Canal Co. v. Ryerson*, 3 Dutch. 457, it was decided that an action might be maintained against a party who continues a nuisance erected by another, without notice or request to abate it. Green, C. J., delivering the opinion of the court, p. 474, said: "The only principle upon which the request is essential is to bring home to the defendant a voluntary continuance, and consequent adoption of the act which constitutes the nuisance. The case of *Pierson v. Glean*, 2 Green, 38, seems to go further, and maintain the principle that the party upon whose land a dam is erected by another, which overflows the land of an adjoining proprietor, is not liable for the continuance of such nuisance before a request to abate it, although he appropriate the dam to his own use, and thus continue the nuisance. The point is not directly made by the pleadings, nor does it appear that the attention of the court was drawn to the fact that the defendant had used the dam, or kept and maintained it otherwise than by suffering it to remain upon his land. The plea avers that the dam was erected, kept up, and maintained before the defendant acquired title, and that he had never since been requested to abate the nuisance. The demurrer to the plea was overruled, and the plea was undoubtedly good, and the decision correct, unless there was a sufficient averment in the declaration that the defendant had not merely suffered the dam to continue upon his land, but had used it for his own purposes, and became liable for a continuance of the nuisance. It is not the erection of a dam, but the holding back of the water upon the plaintiff's land, that constitutes the nuisance; and had the plaintiff, instead of demurring to the plea, replied that the defendant had so held back the water, and had, by means of the gates, from time to time, overflowed the plaintiff's lands, the case would have been brought directly within the authority of *Moore v. Browne*, 3 Dyer, 319 b. But admitting the authority of *Pierson v. Glean*, in its broadest extent, the principle extends only to the case of a nuisance created by a wrongful act done or committed, not to a mere neglect of duty."

NOTICE TO REMOVE NUISANCE, WHEN NECESSARY.—See note to *Plumer v. Harper*, 14 Am. Dec. 333.

STEBBINS v. WALKER.

[2 GREEN LAW, 30.]

SHERIFF HAS THE RIGHT TO PAY TO A PARTY, OUT OF COURT, money raised by him on execution, but he may discharge himself from liability to the execution creditor, by paying the money into court; and where there are conflicting claims to such money, the latter course is the safer one for him to pursue.

COURT MAY, IN A PROPER CASE, COMPEL THE SHERIFF to bring such money into court, and when brought in, either voluntarily or by order of court, may determine conflicting claims thereto.

SUMMARY AID OF THIS COURT CAN NOT BE SUCCESSFULLY INVOKED by a party who stands by and permits the sheriff, acting in good faith, to pay money

by mistake to an execution creditor who is not entitled to it; such party will be left to his legal remedy.

SURPLUS MONEY IN HANDS OF SHERIFF, POWER OF COURT TO CONTROL.—

This court has control over surplus money arising on a sheriff's sale, if the property, at the time of the sale, was subject to or bound by subsequent judgments and executions.

SECOND EXECUTION ACTUALLY LEVIED IS AN EQUITABLE LIEN on the surplus money remaining after payment of a prior execution out of money raised by the sale, and the court can and will protect this equitable right of its suitor, and order such money to be brought into court and applied to the satisfaction of the execution next in priority.

MOTION. The opinion states the case.

Pennington and Vanarsdalen, for the motion.

Ogden and Williamson, *contra*.

By Court, HORNBLLOWER, C. J. In November term, 1832, a rule was granted, on motion, in behalf of William Dow, sheriff of Essex county, and James Richards, a plaintiff in execution, against Peter Walker, that Jacob K. Mead, late sheriff, etc., pay into this court certain surplus money, raised by him on execution against the said Walker, at the suit of Stebbins, Brower & Co., or show cause to the contrary; and further, that cause be shown why the said moneys, if paid in or ordered to be paid in, should not be applied to the satisfaction of certain executions, etc.; and leave was given to take affidavits, etc.

In May term last, the motion to make that rule absolute in both of its branches, and for directions, etc., was argued so elaborately and with so much earnestness and ability, by counsel on both sides, as to demand of this court a very deliberate and solemn decision on the several points that were raised and discussed.

As not only the power of this court over surplus money, but its right to settle priorities between contending execution creditors, and to direct the application of moneys raised under its process, have been debated and seriously questioned by counsel, I have felt it my duty to give to the subject all the consideration in my power.

It would seem to be taking broad ground, to deny to the court the power of compelling a sheriff to bring the money he has raised on execution, into court. This would be to deny to the court the right and the power to compel obedience to the express command of their own writ; for by the execution, the sheriff is commanded to have the money in court on a certain day, to render to the plaintiff for his debt or damages, and costs

And so imperative was this command formerly considered, that Lord Ch. Baron Gilbert, in his law of executions, page 16, says: "No payment to the party will discharge the sheriff's power by the writ; because he is commanded by the writ to have the money in court, there publicly to pay the party; which can not be superseded by any private agreement between the parties." And he afterwards adds: "If the sheriff levy the money on defendant, and delivers it to the plaintiff, unless it be paid into court, the plaintiff has his choice of a new execution, or of a *distringas*, etc., against the sheriff." This strictness was afterwards relaxed, and it was held, that the sheriff might pay the money to the party: *Ree v. Bird*, 2 Show. 87; *Fulwood's case*, 4 Co. 64; *Hoe's case*, 5 Co. 90, a; 2 Bac. Abr., tit. Execution, 710. But whenever the practice commenced, of permitting the sheriff to pay over the money directly to the plaintiff, it was a permissive departure from the command of the writ: 2 Bac. Abr., tit. Execution, 716; 3 Lev. 203, 204; *Turner v. Fendall*, 1 Cranch, 117, etc. And however convenient it may be in practice, yet it is not difficult to discern the wisdom of the old rule, which required the money to be brought into court, and "publicly paid to the party." The satisfaction of the judgment thereby became matter of record, and put an end to further disputes on the subject.

The right of the sheriff to pay the money to the party, out of court, is not, at this day, to be questioned; but it by no means follows, that the court has lost the power of compelling its officers to obey the command of its process. I can not doubt that we have the right, whenever application is made to us for that purpose, and a proper case stated, to compel the sheriff to bring the money into court; neither have I any doubt but that the sheriff, whenever he chooses, for his own safety or convenience, instead of paying the money to the party, out of court, may, in obedience to the command of the writ, bring it here, and pay it in court; such a course would always be safe for the officer; and while at the bar, I uniformly advised sheriffs, when conflicting claims were set up to money raised by them on execution, to pay it into court, and take no part in the out-door disputes, about the right to the money. Such is still my advice to them. The receipt of the clerk of this court is a better bond of indemnity to the sheriff, than any obligation to keep him harmless he can get from the parties. I do not now speak of surplus money, that will be considered hereafter; but I speak of the amount due or raised on execution for the plaintiff. The

sheriff then, having a right to exonerate himself, by bringing the money into court; suppose sheriff Mead, instead of paying the amount due and raised on the Stebbins, Brower & Co. execution to Mr. Degroat, and leaving him to apply it as he pleased, had brought it into court; and suppose sheriff Dow, instead of listening to the conflicting claims of the mortgagees and judgment creditors, and paying over the money in the manner he did, had also brought the amount raised by him, into court; and if these conflicting claims had then been set up here, as they now are, we must have heard the parties, and determined their priorities.

It can not, then, be that the right and power of the court to interfere, depends upon the will of the sheriff. If we have a right to dispose of the money when the sheriff brings it here voluntarily, we have a right to compel him to bring it here when conflicting claims are set up to it. But it is the settled practice of the court. In *Matthews v. Warne*, 6 Halst. 295, this court asserted and exercised the right of postponing a prior execution, issued out of this court in favor of a junior execution, out of the common pleas; and that, too, on the ground of fraud. In *Williamson v. Johnson*, 7 Halst. 86, the money, which, by agreement of parties, was considered as in court, was ordered to be paid on the second execution. In this last case, the authority of the court to interfere in this summary way was questioned, and debated at the bar. But the court, in answer to that objection, said, "the power had been exercised in very many instances and was settled by a train of decisions." A still later case is that of *Sterling v. Vancleve*, 7 Halst. 285, in which the right of the court to settle priorities was exercised. It is too late to question the power of the court in this matter. Nor is there, in my opinion, any just reason to question the expediency of exercising such power. It seems essential to a full and fair administration of justice, that the court should exercise a control over its ministerial officers, and its own process; and in so doing, secure to suitors the lawful fruits of their executions. If the court has not this power, their executions, instead of being "the end of the law," will, in many cases, be the commencement of a new series of suits and litigations.

If the court, then, has the right in this summary way to determine priorities, they must, as incident thereto, have a control over the money raised on their process; or else the right of appropriation is nugatory, and any effort to exercise it would

be in vain. But if a party stands by and permits an officer, acting in good faith, to pay money by mistake, to an execution creditor who is not entitled to it, such party should be left to his legal remedy, and ought not to invoke the summary aid of this court. But if the conduct of the sheriff is *mala fides*, or if, with his eyes open, after notice, he pays over the money, I would not stop to inquire whether he can get it back again. On this part of the subject I will only add, that the supreme court of New York exercises this power, and as instances, refer to the cases of *Adams v. Dyer*, 8 Johns. 347 [5 Am. Dec. 844]; and *Waterman v. Haskin*, 11 Id. 228. So too in South Carolina: *Greenwood v. Colcock*, 2 Bay, 67, and see 1 Keb. 901.

But the great question in this case is, can or ought the court to exercise any control over surplus money? The answer to this general question, in my opinion, is, that under certain circumstances, the court lawfully may and ought to do so.

The case of *Armstead v. Philpot*, Doug. 231, has been considered as the basis of the decisions upon this subject; but it seems to me, that a very singular use has been made of that case. It has no application to the question of the power of the court over surplus money. In that case, the sheriff was directed to retain money in his hands, which he had raised on execution, for a man to satisfy an execution which had been delivered to him against that man. It was neither a case of surplus money, nor yet a question of priority, and if the law of that case had never been questioned, it could have been no authority for or against the application of surplus funds. The next case in order of time, and which has been considered as overruling the one last mentioned, is that of *Fieldhouse v. Croft*, 4 East, 510. But the case was very different from that of *Armstead v. Philpot*, and also from the one before the court. On an execution against the defendant, the sheriff had raised a surplus of nine hundred pounds. There was not before, or at the time of the sale, any other execution extant, affecting the property of the defendant. And in the language of Lord Ellenborough, the sheriff ought immediately to have paid over the surplus to the defendant; but, instead of doing so, the sheriff retained it in his hands until the plaintiff recovered another judgment against the defendant, and sued out execution thereon; and now an application was made to the court to have this second execution satisfied out of those moneys. It was properly refused; for it came to the simple question,

whether a plaintiff can have execution of a debt due the defendant from a third person.

The case of *Knight v. Criddle*, 9 East, 48, was, in principle, precisely like the cases of *Armstead v. Philpot* and *Fieldhouse v. Croft*, though the facts were different. Criddle, the defendant, had recovered judgment, and sued out execution against S. H.; in satisfaction of which, S. H. had paid the sheriff sixty pounds. While this money was in the sheriff's hands, Knight recovered a judgment against Criddle, and sued out execution; and the motion was for a rule on the sheriff, to satisfy Knight's execution out of the money in the sheriff's hands, belonging to Criddle. It was not even surplus money, and the rule was refused, on the ground that a debt due the defendant could not be taken in execution.

The next case cited by counsel, is *Willows v. Ball*, 5 Bos. & Pul. 376. The sheriff had seized the goods of Ball, under a *distringas* against one Noel. After the seizure, and while the goods were in the hands of the sheriff, Willows lodged a *fi. fa.* with the sheriff against Ball. Ball, in an action against the sheriff, for taking his goods, recovered damages to the value of them; and now Willows sought to have his execution against Ball satisfied by the sheriff out of those damages.

The motion was refused on precisely the same ground as in the other cases. Sir James Mansfield, C. J., said: "Considering the goods as turned into money, and the money to belong to Ball, he could see no distinction between that money, so due from the sheriff to Ball, and any other debt that might be due from the sheriff to him." In short, it came, under the facts of the case, to the very same question, whether a debt due to a defendant might be taken in execution. But Sir James Mansfield added this important remark, "that if Willows had a lien on the goods, that might vary the case."

The only other case cited from the English books is that of *Padfield v. Brine*, 3 Brod. & B. 294; 7 Eng. C. L. 443. The sheriff had raised money on an execution for Brine, and Padfield wanted to have his execution against Brine satisfied out of that money. The court discharged the rule on the ground that, like the other cases I have mentioned, it was a naked attempt to take money in execution in the hands of a third person.

The silence of the English reports upon the subject of surplus money may perhaps be owing to the fact that lands are not sold on execution, and it can seldom happen that much surplus can arise on the sale of chattels. But the case of *Turner*

v. *Fendall*, in the supreme court of the United States, 1 Cranch, 116, is in accordance with the cases I have mentioned from the English books. For though the supreme court in that case decided that money might be levied on if in the possession of the defendant, yet that the sheriff could not take money in his own hands belonging to the defendant. But Chief Justice Marshall, by what he said in that case, evidently favored the right of the court to appropriate moneys belonging to a defendant, to the satisfaction of executions against him, as was done in the case of *Armistead v. Philpot*. He remarks, that though a sheriff may pay money out of court, where unobstructed by an injunction, yet if he has an execution in his hands against the person to whom the money belongs, "it is the duty of the sheriff to bring it into court, to be disposed of as the court may direct." "And this," the chief justice adds, "was done in the case of *Armistead v. Philpot*; and this ought to be done whenever the legal and equitable right to the money is in the person whose goods and chattels are liable to an execution."

Thus far, however, we find no case respecting surplus money arising on a sheriff's sale of property which was subject to junior executions. But in New York, the subject has been discussed. In *Ball v. Byers*, very shortly reported, in 3 Cai. 84, the supreme court of that state did direct such surplus money to be paid on a second execution. It is true, in that case the counsel cited *Armistead v. Philpot*, in support of the rule. But we must presume the court were not influenced by that case; for even if good law, it had no application to the subject. The next New York case is that of *Williams v. Rogers*. It was cited and relied on, in opposition to the right of the court to interfere with surplus money. But to my mind, so far as we respect the decisions of that court, it is an authority in support of our jurisdiction in the matter. For, though in that particular case they denied the motion, yet they expressly admit the right of the court, under other circumstances, to exercise a control over surplus money. The facts in that case were peculiar, and the court said they had no means of ascertaining the relative rights of the parties; and in the exercise of that sound discretion, which ought always to govern in such cases, upon the facts presented, they did not think proper to interfere either way; but they add, "the court do not say they will never interfere when the equity of the case can be accurately discerned. If the claims of Coates were out of the question, it would be unreasonable to require the sheriff to pay the surplus moneys into

the hands of the defendant, when he held in his possession a subsequent execution against the property of the defendant, and had no means of satisfying it, but out of those very moneys. The court, it is true, in the case just mentioned, are reported as saying "that it is now the practice in the English courts, not to grant such rules upon the sheriff," and in support of that remark, they cite the cases of *Fieldhouse v. Croft*, *Knight v. Criddle*, and *Willows v. Ball*. But with great deference, I beg leave to say, if by such rules, they mean rules to bring in surplus money, the cases just mentioned prove no such thing.

The only other New York case cited on the argument is *Sandford v. Roosa*, 12 Johns. 162. I do not perceive that it has any bearing upon this question. It only decides that the sheriff must apply the proceeds of his sale to the execution under which he sells, even though it is the youngest execution, and the plaintiff in the first execution must be left to his remedy against the sheriff. The case of *Smalldcourt v. Buckingham*, 1 Salk. 820, is to the same effect.

But the supreme court of New York have directly settled the point in the case of *Van Nest v. Yeomans*, 1 Wend. 87. The second execution was not delivered to the sheriff until the day of sale, and it rather appears by the report, not till after the sale, and before the surplus was paid over, notice was given to the sheriff, and the court ordered the surplus money to be paid to the second execution creditor. Woodworth, Justice, says: "This the court have a right to order; for whilst the avails of the sales remain in the hands of the sheriff, they are subject to the control of the court." And I add, that surely the sheriff can not oust the court of their right by improperly parting with the money after notice.

We now come to the case of *Thompson v. Pierson*, decided in this court, and to be found in 2 Penn. 1019. It is a case directly in point, and if law, fatal to the present application. It is certainly no light matter to overrule or depart from a plain and unequivocal decision of this court, constituted as it was, when Chief Justice Kirkpatrick presided, and when he and Mr. Justice Rossell concurred in that opinion; and it would be with much greater diffidence I should venture to express my dissent, were I not sustained in such a course by Mr. Justice Pennington, who was then on the bench. It is to be regretted that we have not been furnished by the reporter either with the arguments of counsel; or the reasoning of the judges who concurred in opinion. Not a single authority is cited, nor a rule or prin-

eiple of law referred to as the ground of the decision. We are simply told that they were of opinion that this court had no control over surplus money. Such a decision on a matter so vital to the administration of justice, so essentially connected with the very end for which courts have been instituted, and, I may add, a decision so fatal to the just expectations of suitors, can not, I think, challenge the confidence of the bar, or of the public, or be considered as concluding and definitively settling the matter. I feel myself constrained, after the most deliberate consideration, to dissent from the proposition that the court have no control over surplus money.

The reasoning of Mr. Justice Pennington is, to my mind, conclusive, and in addition to what he has said, I feel myself pressed by other considerations. Creditors, however vigilant, can not proceed *pari passu* in pursuit of their rights; there must be a *prius* and a *posterius* in judgments and executions; and a debtor whose property consists in one entire thing, however valuable, would have it in his power to defeat every execution but the first. Under our statute, Rev. Laws, 671, a defendant may elect to have his land first sold under a *fi. fa.* Suppose, then, several executions, all levied in succession on goods and lands, the aggregate amount may be several thousand dollars, the first execution perhaps less than one hundred dollars; the defendant elects to have his land first sold, it is sold accordingly, and brings its value; shall the sheriff deduct the pittance due on the first execution, and pay over the surplus to the defendant, to the utter disappointment of the subsequent execution creditors; and that, too, after their judgments and executions have become liens upon that very land? Yet such would be the result of the doctrine contended for. It may be said this is arguing *ab inconvenienti*, and from the hardship of the rule. It is, indeed, difficult to bring one's mind to believe that a rule so inconvenient, so hard and unjust, can be a lawful one; and I think it is not. Our judgments and executions are not vain and nugatory things; they can not be turned aside by the devices and ingenuity of defendants; they are incumbrances and liens which fasten upon a man's property; and they will hold on to and pursue that property till it has been fairly exhausted in payment of debts.

I do not now say an execution never levied will constitute a lien on surplus money. I give no opinion as to that, but if there has been a levy upon lands or goods, though a sale under a prior execution will pass the title to the property, it will not

divest the equitable lien of the second execution on the surplus money, if any. The court out of which the process issues, can and will protect this equitable right of its suitor, and order the surplus to be brought into court, and applied towards satisfaction of the execution next in priority.

It is no wonder, if one who reads the short case of *Thompson v. Pierson*, should exclaim, "the glorious uncertainty," and he may add, "inefficiency of the law," when they see an insolvent defendant putting nine hundred dollars in his pocket, a part of the price of his property, and quietly walking off with it, in defiance of his creditors, whose executions have been levied on that very property.

The defendant himself could not have sold it, so as to protect it from any of his execution creditors, and pocketed the price, or any part of the price; but the doctrine contended for comes to his aid; the law sells it for him; takes out, perhaps, a very small part of the price, gives him the surplus, and defeats its own process.

I am therefore of opinion, upon principle, upon the reason and nature of things, and in accordance with the decisions in New York, in *Ball v. Ryers*, 3 Cai. 84, and *Van Nest v. Yeomans*, 1 Wend. 87, that the court has control over surplus money arising on a sheriff's sale, if the property at the time of the sale was subject to, or bound by subsequent judgments and executions. I feel myself sustained in this opinion by what was said by the supreme court of the United States, in *Turner v. Fendall*, 1 Cranch, 117, etc.; by the remarks of the supreme court of New York, in *Williams v. Rogers*, 5 Johns. 163, and by the observation of Sir James Mansfield, in *Willows v. Ball*, 5 Bos. & Pul. 376.

If the rights and equities of the parties are complicated, and fit only to be settled in a court of chancery, I would, at least, as suggested by Sir James Mansfield, in the case last mentioned, direct the money to be brought and retained here till the party had an opportunity to apply to that court.

I am therefore of opinion that the rule in this case should be made absolute; so far as to require Sheriff Mead to bring the surplus money in question into court. But as the right to those funds, and whether this is a proper case for this court to direct the application of them, are questions of more importance to the parties, and more difficulty for the court; and as the argument already had upon those points was had in the absence of one of

the members of this court, I think the same ought to stand over for further debate, with leave to the parties to produce additional affidavits and proofs, if they think proper to do so.

FORD, J., concurred.

DRAKE, J., delivered no opinion, as he had been prevented by sickness from hearing the argument.

Cited, approved, and relied upon as authority for the position that the court have control over funds produced by levy of executions, whether in the hands of the sheriff, or when paid into court, in *Cox v. Marlatt*, 7 Vroom, 390.

In *Jones v. Jones*, 18 Am. Dec. 327, it was decided that a sheriff holding money made on an execution from another court, could not be directed to bring it in for distribution.

VANAUKEN v. HORNBECK.

[2 GREEN LAW, 178.]

DESTRUCTION OF NOTE, WHEN MUST BE PROVED.—An action for money lent on a promissory note is substantially an action on the note, and if the declaration allege that the note has been worn out and destroyed, the plaintiff must, on the trial, prove its destruction.

SPECIAL COUNT IS UNNECESSARY in declaring on a lost or destroyed note.

WHERE, IN ACTION FOR MONEY LENT, IT COMES OUT ON THE TRIAL that a note was given for the debt, the note must be produced, or its loss or destruction proved.

EVIDENCE OF DESTRUCTION OF NOTE, WHAT INSUFFICIENT.—Testimony of a witness that he heard the plaintiff, in anger, say that he would burn the note, and that witness saw the plaintiff throw a paper in the fire, is not sufficient evidence of the destruction of the note.

ALTERATION OF DEED BY THE PARTY TO WHOM IT BELONGS, even in an immaterial part, avoids the deed; this rule applies to all written contracts, and particularly to promissory notes and bills of exchange.

INTENTIONAL DESTRUCTION OF NOTE BY PARTY TO WHOM IT BELONGS destroys his right of action on it.

PROMISE TO PAY NOTE THAT HAS BEEN DESTROYED by the owner thereof, does not dispense with the necessity of its production, or proof of its loss or destruction. Such promise would be *nudum pactum* and void, unless made upon some new consideration.

DEBT brought in the court for the trial of small causes, and removed into this court by certiorari. The opinion states the case.

Green, for the plaintiff in certiorari, contended that the state of demand was defective, because the action was on a promis-

sory note, and yet the time of payment, or how it was payable, was not set out. There was not sufficient proof of the loss or destruction of the note to justify the admission of secondary evidence. The evidence, if competent, tended to prove the destruction of the note by the plaintiff himself, and if he destroyed it himself, he can not recover. The plaintiff had no right to abandon his action on the note, and seek to maintain an action on the original claim: 2 Stark. Ev. 226. The plaintiff could not recover upon the acknowledgment of the defendant; even if the defendant had expressly promised to pay the note, it would not be sufficient, unless there was some new consideration for such promise: 4 Taunt. 602.

Ryerson, for the defendant in certiorari.

By Court, HORNBLLOWER, C. J. The state of demand filed in the court below, so far as it is material to the case, was as follows: "The plaintiff demands of the defendant ninety-six dollars for so much money by the plaintiff heretofore, to wit, on the nineteenth of December, 1826, lent and advanced to the defendant, at his request, for which the defendant gave the plaintiff the promissory note of the defendant, payable at a certain day now past, which note, since the making thereof, has been worn out and destroyed."

After a trial, the justice, in the absence of the defendant, rendered judgment for the plaintiff below for ninety-six dollars and forty-eight cents, with costs. Although the state of demand is for money lent, yet it is for money which was due and payable on a promissory note. It is substantially, therefore, an action brought to recover the money due to the plaintiff upon a promissory note given to him by the defendant, which had been "worn out and destroyed." It was therefore necessary for the plaintiff, on the trial, to prove the destruction of the note: *Sebree v. Dorr*, 9 Wheat. 558; *Renner v. Bank of Columbia*, Id. 581; *Smith v. Lockwood*, 10 Johns. 366.

If it was necessary, in the case of a lost or destroyed note, to declare upon it specially as such, I should incline to think the state of demand, in this case, is insufficient, and as neither the date or time of payment is set out, nor whether payable to order or with or without interest. But for the reason given by the supreme court of the United States, in *Renner v. The Bank of Columbia*, 9 Wheat. 581, 597, and 598, I am of opinion such special count is not necessary.

But if the state of demand had been for money lent, or had only set out the original consideration, without any reference to the note, and it had come out on the trial, that a note had been given for the debt, it would have been equally incumbent on the plaintiff to have accounted for the non-production of the note, or, if in his power or possession, to have produced and canceled it at the trial: *Holmes et al. v. De Camp*, 1 Johns. 34 [8 Am. Dec. 293]; *Crane v. Arnold*, 8 Id. 79; *Smith v. Lockwood*, 10 Id. 366; *Kearslake v. Morgan*, 5 T. R. 513.

It was not necessary, in this case, for the defendant to give in evidence the fact of a note having been given for the debt. The state of demand, if not founded on the note, admitted that one had been given, and alleged its destruction; but the plaintiff gave no legal or competent evidence of such destruction. He called one witness whose testimony the justice has recorded in these words: "He heard the plaintiff in anger say, that he would burn the note, and that the plaintiff threw a paper in the fire; and further saith not." This evidence, if legal, was not sufficient to prove the destruction of the note in question. It would not have justified a jury in finding that fact: *Angel v. Felton*, 8 Johns. 149. But if it proved anything, it proved that the plaintiff had designedly and wantonly committed spoliation of his own security; and that he did so, can not now be denied, since he not only asserted the fact, but attempted to prove it on the trial. His own admission must be taken against him; and hence the question arises, whether the plaintiff, by destroying his note, has not lost his debt? In *Benner v. Bank of Columbia*, 9 Wheat. 596, the court say: "If the original is lost by accident, and no fault is imputable to the party," it is sufficient to let in secondary evidence; and in *Angel v. Felton*, above cited, the court say, in reference to some reports of the destruction of the note, that "they were not sufficient evidence of that fact, so as to warrant parol evidence of its contents; and if any inference was to be drawn from them, it was that the note had been voluntarily discharged" (evidently a misprint for destroyed) "by the plaintiff."

It is a clear principle of law, that if a deed be altered by the party to whom it belongs, even in an immaterial part, such alteration avoids the deed: *Pigot's case*, 11 Co. 27; *Den v. Wright*, 2 Halst. 175; and in *Master v. Miller*, 4 T. R. 321, affirmed in the exchequer chamber, 2 H. Bl. 141, and 1 Anstr. 225, it was settled upon great deliberation, that all the principles of public

policy and private security, which forbid the alteration of deeds, apply with equal force to all written contracts, nay with greater propriety to bills of exchange and promissory notes.

If, then, the alteration of a deed or note, by the owner of it, avoids the instrument, surely its entire and intentional destruction, by the party to whom it belongs, must be attended with consequences equally fatal. To permit a party intentionally to destroy his bond, note, or other security, and then come into court, in any form of action, and recover the debt or demand, of which the destroyed instrument was the best and proper evidence, would open a door to frauds without number—there may be memorandums, indorsements, attesting witnesses, or matters apparent on the face of the instrument very important to the rights of the other party; and to get rid of which may be the motive for carelessness or destruction.

In the case under consideration, the note was either in existence, or it was not; there is no pretense of its loss. If in existence, in however worn or tattered a condition, it ought to have been produced. If not in existence, it had been destroyed by the plaintiff himself, and with it he had burnt up his right of action.

There was some evidence on the trial, of the defendant's acknowledgment of the debt. But such acknowledgment, or even promises of payment, would not dispense with the production of the note, nor release the plaintiff from the necessity of accounting for its absence. Such promises would be *nudum pactum*—the promise contained in the note itself was the promise made in consideration of the money lent, and any new or further promises would be void, unless made upon some new consideration: *Davis v. Dodd*, 4 Taunt. 602.

If a new promise had been made under a full knowledge of the willful destruction of the note by the plaintiff, it might possibly be sustained, in consideration of the moral obligation the defendant was under to repay the money borrowed. Yet, I am not certain that the willful destruction of the note, especially if done for a fraudulent purpose, would not cancel even that moral obligation. But on this point I give no opinion; such a case is not now before the court.

The judgment must be reversed.

FORD, J. concurred.

Judgment reversed.

ALTERATION OF WRITTEN INSTRUMENT in a material part, avoids it: *Wheelock v. Freeman*, 23 Am. Dec. 674, and note 677; *Newell v. Mayberry*, Id. 261, note 264.

ACTION ON LOST NOTE.—See note to *Edwards v. McKee*, 13 Am. Dec. 480; *Chandron v. Hunt*, 20 Id. 60, and note 64.

OGDEN v. RILEY.

[2 GREEN LAW, 188.]

TO CHARGE ONE WITH STEALING that which can not be stolen, is not of itself actionable.

WORDS NOT ACTIONABLE.—“John Ogden has stole my marle;” “you are a thief, you have stolen my marle,” are not actionable.

WORDS ARE TO BE TAKEN in their plain and obvious meaning; the old rule that they are to be taken in *mitiori sensu* has been exploded.

SLANDER. The opinion states the case.

Thompson, for the plaintiff.

Eakin, for the defendant.

By Court, HORNBLOWER, C. J. The words charged to have been spoken by the defendant, in the first count, are, “John Ogden has stole my marle;” in the third count, the words are the same, with a little variation in the innuendo; and in the fifth count, the words are, “You are a thief, you have stolen my marle.” To these three counts there is a general demurrer, and a joinder therein.

Marle is a substance known, *eo nomine*, in the law. It is a kind of earth or mineral (4 Jac. Law Dict. 242), and in its natural state, is a part of the freehold. There is nothing in the declaration to show that the marle spoken of, and said to have been stolen, had been previously dug up, or severed from the land or freehold. That which is annexed to, and constitutes a part of the freehold, is not the subject of larceny; and to charge a man with stealing that which can not be stolen, is not, of itself, actionable. So, to say, “You are a thief, you stole my trees;” or “You are a thief, for you stole my trees,” or, “and you stole my trees,” is not actionable; for by trees, when spoken of by that name, and not described as cut down or separated from the land, the law intends trees standing or growing. When cut down or severed from the land, they become wood or brush, and may be the subject of theft: *Smith v. Ward*, Cro. Jac. 674; *Baker v. Pierce*, 6 Mod. 23. So, “He is a thief, and stole my

furze;" or, "He stole iron bars out of my window," are not actionable for the same reason: 1 Com. Dig. 267, F. 4.

Formerly, a distinction was made between saying, "You are a thief, you have stolen," or, "and have stolen my trees," and saying, "You are a thief, for you have stolen," etc. But latter opinions make no difference, if the words were spoken at the same time: *Smith v. Ward*, Cro. Jac. 674.

The words in the fifth count are: "You are a thief, you stole my marle." The latter words are explanatory of the former; they were all spoken at once, and the word "for" is as distinctly understood as if it had been used: 1 Com. Dig. 207, F. 15 and 16; 8 Arch. and Christ.; Bl. Com. 116, in note.

As therefore marle in its natural state is part of the land, and as it is not shown in the declaration that the words were spoken in reference to marle dug up, or severed from the freehold, I am of opinion the demurrer is well taken. At the same time I confess, if this was a new question, my reason might lead me to a different result, especially since the old rule, that words are to be taken in *mitiori sensu* has been exploded, and the more rational one adopted, that the words are to be taken in their plain and obvious meaning in which the rest of the world naturally understand them: *Roberts v. Camden*, 9 East, 93; *Republic v. Keating*, 1 Dall. 110; *Rue v. Mitchell*, 2 Id. 58 [1 Am. Dec. 258]; *Brown v. Lamberton*, 2 Binn. 34.

If a man says, "A. is carting my marle," everybody understands by it that the marle he is carting has been dug up and separated from the land, and they so understand it, because it can not be carted unless it is dug up, and I venture to say that when a man charges another with stealing his trees or his marle, all the rest of mankind, except lawyers, understand it in the same way, and for the same good common-sense reason, viz., that he could not steal the trees or the marle unless the former was cut down or the latter dug up. The artificial reasoning is that trees, or furze, or marle, being a part of the freehold, and continuing so, can not be stolen; and therefore the slanderer must be understood to mean, by stealing, a trespass only, or by the word "thief," a trespasser. But why not, with more reason, understand him as he says; and when he charges another with stealing trees or marle, suppose he means trees or marle in a situation to be stolen? I do not see why the word thief or stole when applied to trees may not be considered as explanatory of trees cut down or severed, as the word trees be

considered as restraining the charge of theft to a mere trespass.

But as Holt, C. J., said in the case cited from 6 Mod.: "It is not worth while to be learned on this subject." We are bound by authorities; and judgment must be entered for the defendant on the demurrer.

FORD, J., concurred.

Judgment for defendant.

WORDS ACTIONABLE PER SE.—See *Wenson v. Sayward*, 23 Am. Dec. 691; note to *Coburn v. Harwood*, 12 Id. 39.

WORDS IN WHAT SENSE TAKEN.—*McGowan v. Manifee*, 18 Am. Dec. 178; *Hamilton v. Dent*, 1 Id. 552.

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

VAN EPPS *v.* VAN DEUSEN.

[4 PAIGE CH. 64.]

- ▲ **FATHER MAY BE COMPELLED TO ACCOUNT AS GUARDIAN** of an infant child, of whose property he has enjoyed the benefit.
- ▲ **MERE STRANGER OR WRONG-DOER, WHO TAKES POSSESSION OF AN INFANT'S PROPERTY,** may in equity be considered as the guardian of the infant, and liable to account as such.
- WHERE A TESTATOR CHARGES THE PAYMENT OF HIS DEBTS** upon his legatees equally, neither can sue to recover a debt against the estate without first relinquishing all benefit which he or she is entitled to under the will, or bringing the other legatees before the court as parties.
- ▲ **HUSBAND'S ASSIGNMENT IN INSOLVENCY** vests in the assignee the wife's personal estate in action, unless the same is secured to her as her separate property. But the assignee takes the legal interest in the same, subject to the wife's right by survivorship, if the husband dies before the assignee has reduced such property to possession.
- THE ASSIGNEE TAKES THE WIFE'S ESTATE** in actions, subject to her equitable claim for support of herself and her infant children, if she has no other sufficient means for that purpose; provided her claim is asserted before the assignee has reduced it to possession.
- CHANCERY WILL ENTERTAIN A BILL FILED BY A WIFE** to restrain her husband, or his assignee, from proceeding at law to possess himself of her property in action, and to compel him to allow her a suitable provision out of the same for her support.
- WHERE AN ANSWER OBJECTS TO THE WANT OF PROPER PARTIES,** the complainant should amend his bill before any further proceedings are had in the cause.
- IDEM—IF HE NEGLECTS TO DO THIS,** the court may, at the hearing, permit the cause to stand over for the purpose of bringing the proper parties before the court, on payment of costs to the adverse party, or dismiss the bill, with costs.
- IDEM—THE PROPER COURSE IN SUCH CASE,** if the cause is not permitted to stand over, is to dismiss the bill without prejudice to the claim, or right of the complainant, in any future litigation.

NOTE.—If the objection of want of proper parties is raised at the hearing, for the first time, the bill should not be dismissed, where the defect can be remedied by an amendment or a supplemental bill, and the complainants elect so to do within a reasonable time; provided that necessary parties were not left out of the bill by the fraudulent or willful omission of the complainant, or in bad faith.

BILL in chancery to compel the defendant, the sole acting executor of Harpert Van Deusen, the elder, to account for moneys on certain bonds, alleged to have been received some thirty-two years since by Harpert, and also for the value of the services of a certain female slave received about the same time by Harpert, and kept by him until her death. The bill alleged that one of the complainants was entitled to such bond and slave, as legatee under a certain will; that she was an infant at that time, but had since married Van Epps, the other complainant, and that Harpert was her father. Demand upon Harpert during his life-time was averred, together with promises to pay, and their non-fulfillment. The defendant denied all knowledge of the facts set forth in the bill in regard to the bond and slave, and alleged that the will of Harpert bequeathed certain property to his four children, of whom Mrs. Van Epps was one, charging the payment of his debts equally by them. The answer further urged that the two other children should have been made parties, the defendant being the fourth, and claimed the benefit of the non-joinder the same as if defendant had pleaded or demurred; and also stated that the complainant Evert Van Epps since his marriage with Mrs. Van Epps had made an assignment in insolvency, which passed whatever demands complainants had against the estate, to the assignee, who ought to have been a party. Defendant claimed the benefit of this objection the same as if it had been pleaded in bar. On the trial, it appeared that the farm bequeathed to Mrs. Van Epps by her father, originally belonged to her maternal grandfather, although some evidence was introduced of a release in fee by her mother to her father.

J. L'Amoureux, for the complainant. Harpert was chargeable as guardian: *Grimke v. Grimke*, 1 Desau. 366. The wife's equity did not pass to the assignee in insolvency of her husband: 3 Petersd. 403, 404; 5 Johns. Ch. 464; 6 Id. 25, 178; *Mumford v. Murray*, 1 Paige Ch. 620; *Smith v. Kane*, 2 Id. 303. It was not necessary to make the other legatees parties: 2 Johns. Ch. 623, 628; 3 Id. 553; 1 Id. 349, 437. It was not necessary for complainants to relinquish their rights under the will of Har-

pert: 2 Madd. Ch. 41, 42; 5 Cow. 370; 4 Wend. 443; Matthews on Presump. Ev. 111, 112.

Daniel Cady, contra.

The CHANCELLOR. From the testimony in this case, there is very little doubt that Harpert Van Deusen, the elder, between forty and fifty years since, received a certain sum of money, the precise amount of which can not now be ascertained, and that this money then belonged to his infant daughter. It also appears that he took home the black girl after the expiration of her indenture, in 1797, and had the benefit of her services until her death. Although, as the mere guardian by nature, he had no right to receive the money due on the bond, or to receive the services of the slave, yet this court will hold him liable to the same extent as if he had been the legally constituted guardian, so far as he has had the benefit of the infant's property. A mere stranger, or wrong-doer, who takes possession of the property of an infant, and receives the rents and profits thereof, may, in equity, be considered as the guardian of the infant, and may be compelled to account as such: 1 West, 265; 2 P. Wms. 645; 1 Vern. 296; 2 Car. Law Repos. 412. The father, however, could not be charged with the value of the slave, but only with the net profits of her labor received by him, over and above the expense of her clothing and support. The death of the slave at the early age of twenty-four or twenty-five, as stated in the bill, was a loss for which the father could not be answerable. If the question as to the receipt of the amount due on the bond, and the services of the black girl, was the only one in this case, it might be necessary to inquire whether the loose declarations of the father, which are testified to by the children of the complainants, were sufficient to revive the cause of action for these stale claims, which had lain dormant for more than twenty-five years after the husband's legal right to recover such claims had accrued. In relation to the equity of these claims, it may be sufficient to remark that the complainants undoubtedly received an ample equivalent therefor in the free use which they had of the Greenbush farm, without rent, for more than ten years after the discharge of E. Van Epps, under the insolvent act, in 1816, and before the death of his father-in-law. If that farm actually belonged to the mother of Mrs. Van Epps, the father, as tenant by the curtesy, was entitled to the use of it during his life, and he therefore had a legal right to charge the complainants for the use thereof. And it is hardly to be pre-

sumed that he would have suffered them to occupy the farm without rent for so many years, if he had supposed this dormant claim would have been revived after his death, for the purpose of defeating the disposition of his property which had been made by his will. There are other objections to the recovery in this suit, however, which render it unnecessary for me to decide upon the merits of that part of the controversy at this time.

There can be no doubt of the intention of the testator to charge each of his children, who were legatees or devisees under his will, with the payment of one fourth of all debts which were justly due and owing by him at the time of his death. After directing the payment of his debts by his executors, in the usual form, and disposing of all his real and personal estate among his children and others, the testator proceeds as follows: "Notwithstanding the directions herein contained for the payment of my debts, I hereby order and direct my son Harpert, and my daughters Nancy, Margaret, and Getty, each to bear and pay one fourth of all past claims and debts that shall be claimed or obtained from my executors, or paid by my executors; and that each shall bear and pay one fourth of my funeral expenses, and the putting of a good and decent fence around the burying ground on the farm on which I reside, and of procuring a good tombstone for my grave." Although an ordinary creditor of the testator might not, even in this court, be deprived of his usual remedy against the executor for an account and satisfaction of his debt out of the personal estate, without bringing these other legatees and devisees before the court (upon which point I do not intend to express any opinion at this time), neither of those legatees or devisees can bring a suit to recover a debt against the estate, without first relinquishing all benefit which he or she is entitled to under the will, or bringing the other parties, who are bound to contribute towards the payment of that debt, before the court as parties. If the whole property devised and bequeathed to Mrs. Van Epps actually belonged to her, in equity, as the heir at law of her mother, it is probable that, upon a bill properly framed, she might have a decree against the three other devisees and legatees under the will, for the payment of a debt justly due from the testator, without relinquishing the mere legal title to her own property, which was transferred to her by the will. But even in that case, she would be compelled to relinquish the specific legacy of certain personal property given to her by

the will, or to abandon her claim as to one fourth of the debt. And to such a bill the two half sisters, who are bound to contribute towards the payment of the debts, should be parties. In the bill filed in this case, there is no allegation whatever as to the equitable right of the complainants to the Greenbush farms, independent of the devise thereof by the will of the testator. That question, therefore, was not in issue in this cause, and no decree could properly be founded upon the admissions or proofs in relation to this subject.

Another serious and substantial objection to the complainants' right to a decree in this cause, arises out of the assignment of the husband under the insolvent act, in 1816. That assignment is no bar to the wife's equity to a support for herself and her infant children out of the property which belonged to her husband in her right merely, provided her other property is insufficient for that purpose. But as between the husband and this defendant, as the representative of his father, neither can be admitted to allege or prove that the testator committed perjury in the insolvent proceedings. It appears from those proceedings, that the testator became a petitioning creditor of Van Epps, for the sum of one thousand five hundred and twenty-nine dollars and eighty-seven cents, which was nearly two thirds of all the debts then owing by the insolvent. Both must therefore have sworn on that occasion that such sum was justly due from Van Epps to the testator. And all the husband's interest in the claim for which this suit is brought, is specifically pledged in the hands of the assignees for the payment of this and other debts due to the creditors of the insolvent at that time.

An assignment by the husband under the insolvent act, vests in the assignee the personal estate in action of the wife, unless the same is secured to her as her separate property. But the assignee takes the legal interest in the same subject to the wife's right by survivorship, if the husband dies before the assignee has reduced such property to possession: *Harper v. Ravenhill*, 1 Taml. 144; *Pierce v. Thornely*, 2 Sim. 167; *Honner v. Morton*, 3 Russ. 65, 90. The assignee also takes the assignment of the wife's estate in action, subject to her equitable claim thereon for the support of herself and her infant children, if she has no other sufficient means for that purpose; provided such claim is asserted by the wife, or there is a suit instituted in this court for the recovery of such property before the assignee has reduced it to possession: *Smith v. Kane*, 2 Paige, 303; *Steinmetz v. Halthin*, 1 Glyn & Jam. 64; 2 Kent

Com. 139. It has, indeed, been doubted whether this court could interfere to restrain the husband, or his assignee, from proceeding at law to possess himself of the wife's property in action, and to compel him to allow her a suitable provision out of the same for her support. But if the wife is entitled to such an equity upon a bill filed by the husband or his assignee, or by a third person, as all the cases upon this subject admit, I can see no valid objection in principle against granting her similar relief where the husband, or the general assignee in bankruptcy, is endeavoring to deprive her of that equity by an unconscientious proceeding in a court of law.

The case referred to by Lord Hardwicke, 1 West, 581, in which an injunction was granted to restrain the husband of an infant *feme-covert* from proceeding in the ecclesiastical court to recover a legacy due to his wife, is analogous in principle to the case of an injunction to restrain the husband or his assignee from proceeding at law for the same purpose. It is settled, indeed, in the case of *Kenney v. Udall*, 5 Johns. Ch. 464; S. C., 8 Cow. 590, that if the wife's property in action is of equitable cognizance, she may file her bill in this court against her husband or his assignee, to restrain them from obtaining possession of the fund without providing for her support. The same principle has been recognized by the court of appeals in Kentucky. See *Elliott v. Waring*, 5 Mon. 341 [17 Am. Dec. 69]. The claim in this case comes within the principle of those decisions; as this court treats a party who has received the property of an infant as the guardian, and compels him to account as such. I am therefore satisfied that, upon a proper bill, the right of the wife would be protected as against the creditors of the husband, and against his assignee under the insolvent act. The equity of the wife, however, does not extend to the assigned property, where she has a reasonable fund for the support of herself and her infant children independent thereof. In this case, it appears by the pleadings and proofs that she has a valuable farm of three hundred acres of land; and there is nothing to show that it is not amply sufficient for her support. If such is the fact, she has no equitable claim whatever to this demand against the estate of her deceased father, the legal title to which passed to the assignee of her husband for the benefit of the creditors, thirteen years before the filing of the bill in this cause. But the proper parties are not before the court for the decision of this question. A decree in this case would not protect the defendant against the claim of the assignee. And as

this objection was distinctly made in the answer of the defendant, the complainants should have amended their bill and brought the assignee before the court, if they wished to enforce the wife's equity to a provision out of the assigned property.

There seems to be some little doubt as to the practice of this court in dismissing the bill for want of proper parties, or in permitting the complainant to amend, or to file a supplemental bill, for the purpose of bringing the proper parties before the court. I apprehend the whole difficulty on this subject has arisen from a want of attention to the distinction between those cases where the objection is taken by the defendant at the proper time and in the proper form, by plea, answer, or demurrer, and those where he neglects to make the objection until the hearing of the cause. If the objection is taken by plea or demurrer, it is a matter of course to dismiss the complainant's bill upon the allowance of the plea or demurrer, unless the complainant takes issue on the plea, or obtains leave to amend upon the usual terms. But the defendant is not bound to plead or demur. He may make the objection in his answer, and may have the same benefit of the objection at the hearing as if it had been taken by plea or demurrer. Where the objection is made in the answer, the proper course for the complainant is to amend his bill, so as to bring the proper parties before the court before any further expense has been made in the cause. If he neglects to do this, it will rest in the discretion of the court at the hearing, to permit the cause to stand over, upon the payments of all such costs as he may have unnecessarily subjected the adverse party to by his neglect, for the purpose of enabling him to bring the proper parties before the court, or to dismiss the bill with costs. See *Baldwin v. Lawrence*, 2 Sim. & Stu. 18; *Greenleaf v. Queen*, 1 Pet. 149. And if the bill is dismissed at the hearing for want of proper parties, it should not be dismissed absolutely, as that might bar a future suit against the same defendants, in which all other necessary parties were brought before the court. See *Craig v. Barbour*, 2 J. J. Marsh. 220; *Thompson v. Clay*, 3 Mon. 361 [16 Am. Dec. 108]. The proper course in such a case, if the cause is not permitted to stand over, is to dismiss the bill without prejudice to the claim or right of the complainant in any future litigation. If the defendant makes no objection for want of proper parties, either by plea, answer, or demurrer, and raises that objection for the first time at the hearing, the bill should not be dismissed, where the defect can be remedied by an amendment or a supplemental bill, provided the complainant elects to bring the proper

parties before the court within a reasonable time: 8 Mon. 125; 7 Id. 57, 217, 477; *Guen v. Poole*, 5 Bro. P. C. 504, Toml. ed.; *Court v. Jeffrey*, 1 Sim. & Stu. 105. I am aware of but one exception to this rule, and that is where it is evident that the necessary parties were left out of the bill by the fraudulent or willful omission of the complainant, or in bad faith. See *Stafford v. The City of London*, 1 P. Wms. 428; *Rowland v. Garman*, 1 J. J. Marsh. 76 [19 Am. Dec. 54].

In this case, the discharge of E. Van Epps under the insolvent act, in 1816, and the assignment of his property, were distinctly stated in the answer. The complainants were also apprised by such answer that the objection for the want of parties would be made at the hearing, and that the defendant claimed the same benefit as if the objection had been made by a plea. As it was perfectly evident that no decree could be made against the defendant in favor of the wife's equity without having the assignee before the court, and as the facts stated in the answer must have been within the personal knowledge of both the complainants, there is no excuse for their neglect to bring the assignee before the court, by an amendment of the bill in proper season. There are also many reasons for believing that further litigation in this matter would only subject the complainants to a useless and unnecessary expense, from which they could not ultimately derive any benefit. I shall therefore direct this bill to be dismissed, with costs, but without prejudice to the equitable rights of the wife, if she thinks proper to institute a new suit, and to bring all the necessary parties before the court.

FATHER'S RIGHT AS GUARDIAN OF HIS INFANT CHILDREN examined and defined: *Helms v. Franciscus*, 20 Am. Dec. 402; *Combs v. Jackson*, 19 Id. 568.

RIGHT OF HUSBAND'S ASSIGNEE IN INSOLVENCY to the wife's property in action. The doctrine of the principal case, as approved in *Westervelt v. Gregg*, 12 N. Y. 205; *Mallory v. Vanderheyden*, 3 Barb. Ch. 15; *Storm v. Waddell*, 2 Sandf. Ch. 502.

THE PRACTICE WHERE PROPER PARTIES HAVE BEEN OMITTED, as here outlined, is followed in *Bard v. Poole*, 12 N. Y. 506; *Newman v. Marvoin*, 12 Hun. 242; *Peck v. Mallams*, 10 N. Y. 522, 549; *Shaver v. Brainard*, 29 Barb. 27; *Gleason v. Thayer*, 24 Id. 86; *Vanderwerke v. Vanderwerke*, 7 Id. 226; *Kidd v. Dennison*, 6 Id. 18; *Hutchinson v. Reed*, 1 Hoff. Ch. 320; *Miller v. McCam*, 7 Paige Ch. 457.

IN RESPECT TO THE INTERFERENCE OF A COURT OF EQUITY where a husband or his assignee in insolvency is seeking to obtain possession of the wife's property, the principal case is referred to in *Martin v. Martin*, 1 Hoff. Ch. 467; *Storm v. Waddell*, 2 Sandf. Ch. 503; *Mallory v. Vanderheyden*, 3 Barb. Ch. 15; *Van Duzer v. Van Duzer*, 6 Paige Ch. 370; *Noe v. Noe*, 13 Hun. 438.

LASALA v. HOLBROOK.

[4 PAGES OR. 169.]

RIGHT OF LATERAL SUPPORT.—The owner of land has a natural right to the use of it, in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots.

IDEM.—But one has a right to dig upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to adjacent lots in their natural state; and this right can not be taken away by the erection of buildings on neighboring soil whose weight causes the earth to fall into the excavation.

ONE WHO IS ABOUT TO ENDANGER HIS NEIGHBOR'S BUILDING, by making excavations on his land, is bound to give the owner of the adjacent soil proper notice of the intended improvement, and to use ordinary skill in conducting the same; and it is the duty of the latter to prop up his own building so as to render it secure in the mean time.

CERTAIN BUILDINGS ARE ENTITLED TO FULL PROTECTION against the consequences of any new excavation; these are ancient buildings, or those erected upon ancient foundations, by reason of prescription, and those which were granted by the owner of the adjacent lot, or by those under whom they claim.

AN INJUNCTION WILL NOT LIE to restrain one from making reasonable improvements on his own land, with reasonable care and skill, on the ground of damage to complainant's edifice, if the latter is not entitled to special protection, either by prescription or by grant from the one making the improvement.

APPLICATION to dissolve or modify an injunction. The bill on which the injunction was granted stated that the plaintiffs were seised of a certain lot on which Christ's church stands, having been erected thirty-eight years since; that the defendant owned an adjoining lot, extending within six feet of the church, and commenced the erection of a building intended to cover his entire lot, and to be six stories high; that the defendant contemplated sinking the foundation of his building sixteen feet, which was ten feet below the foundation of the church, thereby greatly endangering the church; that one corner of the church, by reason of the excavation already made, had settled, causing a considerable crack in the wall; that complainants had consulted persons skilled in such matters, and had been by them informed that if the excavating continued, the church was in imminent danger of being destroyed. The prayer for an injunction to restrain the removal of any further soil was granted. An answer was immediately put in, and a petition filed, setting forth that defendant's men were thrown out of employment and he put to great damage by the stopping of his work. An order to show cause was granted, returnable soon thereafter. The answer stated

that the defendant was proceeding in good faith, in a reasonable manner, with all possible care and prudence, and that he had employed skilled workmen; he alleged that the crack in the church was occasioned by the settling of the earth in the rear thereof, which had been used for a cemetery, from the weight of buildings placed thereon by the complainants' permission.

J. Lynch, for the complainants.

D. Lord, jun., contra.

The CHANCELLOR. I can readily believe, from the nature of the soil, and from the great depth of the defendant's intended excavation below the foundation of the church, that the complainants' fears for the safety of their building are not entirely groundless; although the defendant alleges in his answer, and undoubtedly supposes, there is no danger of serious injury to the walls of the church from the proceedings of his workmen. It is not, however, alleged in the complainants' bill that the defendant is proceeding to improve his property in an unreasonable or unusual manner, or with any intention of injuring their wall or building. Neither do they claim any particular privilege as belonging to their church, either by grant of the defendant, or those under whom he claims, or by prescription. This case, therefore, presents the question, whether one person can be restrained from making a reasonable improvement on his own premises, because the same can not be made without endangering a modern edifice erected upon the adjacent premises of another. *Sic utere tuo ut alienum non lædas*, is a maxim well known to our law; but the propriety of applying this maxim to a particular case sometimes becomes a question of great doubt, from the difficulty in determining what is a legal injury to the property of another. The erection of a new mill in the immediate vicinity of one which had been previously erected by another person, might in fact destroy a moiety of the value of his mill, yet this maxim could not be properly applied to such a case. The owner of the first mill sustains no legal damage, because at the time he erected it, he knew his neighbor had a legal right to make a similar improvement on his own premises, of which he could not deprive him by the previous erection. But if the first mill was supplied by a stream of water which had been accustomed from time immemorial to flow in a particular channel, the owner of the second mill could not divert the stream from its accustomed channel, although done on his own land, so as to deprive the

first mill of its necessary supply of water. The diverting of the water, in such a case, would be a legal injury to the owner of the first mill; because it would deprive him of a natural right, which was paramount to the right of his neighbor, to an artificial use of the water. Upon examining the several cases on the subject, the same principles appear to have been applied to injuries arising to the owner of one lot by the artificial use of an adjacent lot by its owner. I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. And the owners of those lots will not be permitted to destroy my land by removing this natural support or barrier.

Thus it is laid down by Rolle, that I may sustain an action against a man who digs a pit on his own land so near to my lot that my land falls into the pit: 2 Roll. Abr. 565, l. 10. But my neighbor has the right to dig the pit upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to my land in its natural state. I can not, therefore, deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit which he may dig in the proper and legitimate exercise of his previous right to improve his own lot: 1 Sid. 167; 2 Roll. Abr. 565, l. 5. These principles were fully recognized by Parker, C. J., in the case of *Thurston v. Hancock*, 12 Mass. 223 [7 Am. Dec. 57], where it was held that the defendants, who had excavated their own lot to the depth of thirty feet below the foundation of the plaintiff's house, were not liable for having thus placed the house in a dangerous position; but that the plaintiff was entitled to recover for the damage, if any, which had been occasioned by the loss of his soil in consequence of such excavation. And in the case of *Panton v. Holland*, 17 Johns. 92 [8 Am. Dec. 369], where the defendant, in the exercise of ordinary care and skill in making an excavation for the improvement of his own lot, had dug so near the foundation of the plaintiff's house as to cause it to crack and settle, it was held he was not liable for the injury. From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same; and that it is the duty of the latter to shore or prop up his own building so as to render it secure in the mean time. See *Peyton v. The Mayor of*

London, 9 Barn. & Cress. 725; S. C., 4 Man. & Ry. 625; *Walters v. Pfeil*, 1 Moo. & M. 362; *Massey v. Goyder*, 4 Car. & P. 161. There is another class of cases, however, where the owner of a building on the adjacent lot is entitled to full protection against the consequences of any new excavation or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations, and which, by prescription, are entitled to the special privilege of being exempted from the consequences of the spirit of reform operating upon the owners of the adjacent lots; and also those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title: *Palmer v. Fleshees*, 1 Sid. 167; *Cox v. Matthews*, 1 Vent. 237, 239; *Story v. Odin*, 12 Mass. 157 [7 Am. Dec. 46]; *Brown v. Windsor*, 1 Crompt. & J. 20.

In the case under consideration, the complainants' church was not entitled to any special protection against the consequences of the present proceedings of the defendant, either by prescription or by grant from the owners of the adjacent lot upon which the excavation was going on; and as the defendant and his workmen are in the exercise of reasonable care and skill in the erection of his building, and in laying the foundations thereof, the complainants must adopt such course as will secure their church against the dangers to which it is exposed. They are not, therefore, entitled to the aid of this court to suspend the operations of the defendant; and

The injunction must be dissolved.

RIGHT OF LATERAL SUPPORT.—This subject is discussed in the note to *Thurston v. Hancock*, 7 Am. Dec. 57; and in subsequent cases arising in New York, where the principles laid down in the principal case are adverted to and applied: *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 556; *Lampman v. Milks*, 21 Id. 514; *Partridge v. Gilbert*, 15 Id. 612; *Auburn and Cato Plank Road Co. v. Douglass*, 9 Id. 448; *Radcliff v. Brooklyn*, 4 Id. 202; *Bensen v. Suarez*, 28 How. 513; S. C., 43 Barb. 409; S. C., 19 Abb. 65; *Pixley v. Clark*, 32 Id. 273; *Farrand v. Marshall*, 21 Id. 414; S. C., 19 Id. 383; *Beljows v. Sackett*, 15 Id. 101; *Ludlow v. Hudson River R. R. Co.*, 6 Lana. 131, *People ex rel. Barlow v. Canal Board*, 2 N. Y. S. C. (T. & C.) 277, 278, 279.

DICKERSON v. TILLINGHAST.

[4 PAGE CH. 215.]

HE IS NOT A BONA FIDE PURCHASER who merely takes the legal estate in payment of or as security for a previous debt.

TO CONSTITUTE ONE A BONA FIDE PURCHASER, he must, before he has notice of a prior equity, either part with his property on the credit of the estate, or give up some security, or part with some right, or place himself in a worse position than he would have occupied had he received the notice before his purchase.

ONE WHO TAKES A CONVEYANCE of an estate in payment of a debt without notice of a prior unrecorded mortgage, is not a subsequent *bona fide* purchaser as against the mortgagee.

ON A FORECLOSURE OF A MORTGAGE on lands, portions of which have been subsequently conveyed by the mortgagor to others, such portions are to be sold in the inverse order of their alienation.

BILL to foreclose a mortgage given by one of the defendants, Catharine Tillinghast, to the plaintiffs' testator, Mrs. Hughes. The other defendant, Charles Tillinghast, was the mortgagor's son, and had received a conveyance of the premises from his mother, subsequent to the mortgage, the consideration for which was a debt due the son from the mother as the former's share in his father's estate, of which his mother was administratrix. The mortgage was not recorded until after the conveyance to the son, and he alleged, and it was not contended to be other wise, that he took in good faith, and in ignorance of the mortgage. It was also alleged in the answer, that the mortgagor had originally bought the land with money derived from speculating with property of the estate. The principal point, however, was whether the defendant Charles was protected by the recording act. The cause was submitted on the bill and answer.

D. Lord, jun., for the complainants. The deed did not constitute Charles a *bona fide* purchaser within the meaning of the recording act. To make one such a purchaser, he must part with money or property, or do some irrevocable act on the faith of such conveyance: *Jackson v. Campbell*, 19 Johns. 282, 283; *Churchill v. Grove*, 1 Ch. Cas. 35, 36; *Coddington v. Bay*, 20 Johns. 637 [11 Am. Dec. 342]; *Jackson v. Rowe*, 2 Sim. & Stu. 472.

R. J. Hilton, contra, relied upon *Jackson v. Campbell, supra*; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 603; *Frost v. Beekman*, 1 Id. 288.

The CHANCELLOR. From the answers in this case, it must be taken as true, that when Mrs. Tillinghast conveyed to her son,

she concealed from him the fact that she had given a previous mortgage on the premises, which was then an existing lien thereon. If she knew the mortgage was not recorded, the fraud was probably intended to be committed upon Mrs. Hughes. But if she supposed it was recorded, it was a fraud upon her son to convey to him property which she had already mortgaged to another, without disclosing to him that fact. The legal title to the land was in Catharine Tillinghast at the time of the execution of the mortgage, and there is no pretense that Mrs. Hughes had any information as to the manner in which she had paid for the land, at the time the loan was made, and the mortgage given to secure the same. If this had been otherwise, I am inclined to think there might have been a prior equity in favor of the defendant, Charles Tillinghast, to the extent of his share of the assets of the estate of his father, which were applied to the payment of the first installment of the purchase money of this particular portion of the Seneca lands. This, however, would be but a very small portion of the value of the premises, as the mother was the owner of one third of the assets in her own right, and the brothers and sisters of Charles were entitled to share with him in the residue. The complainants' mortgage is a valid lien upon that part of the premises conveyed to Charles Tillinghast, unless, upon the facts disclosed, he is to be considered a *bona fide* purchaser without notice, within the meaning of the recording act.

The object of the registry and recording acts was to protect those who should part with their money, property, securities, or other valuable rights, upon the faith of a conveyance or mortgage of real estate, supposing that they were getting a good title thereto, or a legal and specific lien thereon; and without notice, or having any reason to believe, that there was any previous mortgage or conveyance which could defeat such title or lien. The English registry acts made the unregistered deed or incumbrance at law wholly inoperative and void, as against a subsequent grantee or incumbrancer. But the court of chancery, in accordance with the manifest spirit and intention of the statute, at an early day, adopted the principle of considering the prior deed or incumbrance as an equitable title or lien. It therefore applied to such cases the equitable principles, which had previously been adopted by that court, in relation to other contests between the holder of an equitable title or lien, and a subsequent grantee or mortgagee of the legal title. In accordance with those principles, if the subsequent purchaser or mort-

gagee was a *bona fide* purchaser, that is, if he had actually parted with his property on the credit of the estate, so as to give him an equitable claim or specific lien thereon, without notice of the prior equity, and had also clothed that equitable lien with the legal title, by taking a deed or mortgage, the court would not divest him of that legal title or lien in favor of the prior equity. But if he had notice of the prior equity at any time before he had parted with his property on the credit of the estate, and before he had united the subsequent equity with the legal title, he was not considered as entitled to protection against the prior equity as a *bona fide* purchaser. The words *bona fide* purchaser, therefore, when introduced into our recording and registry acts, were intended to be used in conformity with this established meaning thereof; and they must, in the present case, receive the same construction which they had previously received in the court of chancery, in reference to that principle of equity. If a person has an equitable title to, or an equitable lien upon real estate, a subsequent purchaser who obtains a conveyance of the legal estate, with notice of that equity, can not, in conscience, retain such legal title, as he has no equity united with it. So if he merely takes the legal estate in payment of, or as security for a previous debt, without giving up any security or divesting himself of any right, or placing himself in a worse situation than he would have been if he had received notice of the prior equitable title or lien previous to his purchase, this court will not permit him to retain the legal title he has thus obtained, to the injury of another. These principles are so familiar to every chancery lawyer, that it is not necessary to refer to the numerous decisions and elementary treatises in which they are to be found.

The case of *Coddington v. Bay*, in the court of errors in this state, 20 Johns. 637 [11 Am. Dec. 342], is a leading case upon the question as to what is necessary to constitute a *bona fide* purchaser of a negotiable security for a valuable consideration without notice of a prior equity; and is analogous to the case now under consideration. It was there held that the receiving of a negotiable note in payment of, or security for a pre-existing debt, without any new consideration or other change of rights on the part of the persons receiving it, did not constitute them *bona fide* purchasers for a valuable consideration; although they supposed that the person from whom they received the note had a perfect right to dispose of it in that manner.

In this case, Charles Tillinghast took the conveyance of the

property under a belief that his mother had a right to dispose of it in that manner, and without any suspicion that she was either committing a fraud upon him, or upon any other person. But he only received it towards a pre-existing claim that he had against his mother for a share of his father's estate which she had appropriated to her own use; and it is not alleged that he parted with any security, relinquished any right, or made any valuable improvement on the property, upon the faith of the title thus conveyed, and before he had notice of Mrs. Hughes' mortgage. I must therefore declare that this mortgage is a valid and subsisting lien upon the lands conveyed to him. It must be referred to a master to compute the principal and interest due. And upon the coming in of the report, the master must proceed and sell the mortgaged premises, or so much thereof as is necessary to pay the amount reported due, with interest and costs. The decree, however, must direct that part of the mortgaged premises, if any there is, which belongs to Catharine Tillinghast, to be sold first, and then such part of the premises as have been conveyed by her subject to the mortgage, in the inverse order of alienation; so that the lands conveyed to her son Charles shall not be sold, if there is sufficient raised to pay the complainants without resorting to his part of the mortgaged premises.

The master who sells the property is also to ascertain whether any part of the premises are incumbered by a mortgage to the state, and if so, to ascertain the amount due, and either to sell that part subject to such mortgage, or to pay the amount thus ascertained to be due, out of the proceeds of the sale of that part of the premises, as he shall deem most advantageous to the parties in this suit. The master who makes the sale is also to be authorized to cause such surveys to be made as he may deem necessary, and to compel the production of such deeds and papers as he may think proper for the purpose of ascertaining the separate interest of the defendants, and their several rights, by priority or otherwise. Upon the coming in of the master's report of sale, the defendant, Charles Tillinghast, is to be at liberty to apply to the court for such decree as he may be entitled to against his mother or any other of the defendants in this cause, either upon the covenant in her deed, or for the costs of his defense in this suit, or for contribution, or otherwise.

BONA FIDE PURCHASER DEFINED: *Durell v. Haley*, 19 Am. Dec. 444; *Coleman v. Cocke*, 18 Id. 757; *Nantz v. McPherson*, Id. 216, and cases in note; *Jackson v. McChesney*, 17 Id. 521; *Blight v. Banks*, Id. 136, and note; the requisites to constitute one a *bona fide* purchaser, as prescribed by the chancellor in the principal case, are recognized as essentials in *Evertson v. Evertson*, 5 Paige, 648; *Holmes v. Grant*, 8 Id. 252; *Peck v. Mallams*, 10 N. Y. 545; *De Peyster v. Hasbrouck*, 11 Id. 591; *Wood v. Chapin*, 13 Id. 525; *Curtis v. Leavitt*, 15 Id. 196; *Van Heusen v. Radcliff*, 17 Id. 582; *Schroeder v. Gurney*, 10 Hun, 417; *De Lancey v. Stearns*, 66 Id. 162, where it is said: "It has been held in numerous cases that one who, without notice of a prior unrecorded mortgage, takes a conveyance of land in payment of an existing debt, or as a security therefor, without giving up any security, divesting himself of any rights, or doing any act to his own prejudice, on the faith of the title, before he has notice of the mortgage, is not a *bona fide* purchaser;" so also in *Tiffany v. Warren*, 24 How. Pr. 297; S. C., 37 Barb. 575; *Barnes v. Camack*, 1 Barb. 397; *Stuart v. Kissam*, 2 Id. 509; *Wiles v. Clapp*, 14 Id. 647; *Pickett v. Barron*, 29 Id. 508; *Harris v. Norton*, 16 Id. 296; *Wright v. Douglass*, 10 Id. 107; *Hoyt v. Hoyt*, 8 Bosw. 527.

DE RIVAFINOLI v. CORSETTI.

[4 PAIGE CH. 264.]

A SPECIFIC PERFORMANCE OF A CONTRACT will not be decreed upon a bill filed prior to the time at which the contract is to be performed.

A BILL QUIA TIMET WILL NOT BE SUSTAINED on the ground of the complainant's fear that the defendant might not be willing to perform an engagement for personal services; and where, from the peculiar nature of those services, they could not be performed until a future day.

THE WRIT OF NE EXEAT IS IN THE NATURE OF EQUITABLE BAIL; and, to entitle one to such bail, there must be a present debt or duty, or some existing right to relief against the defendant or his property, either at law, or in equity.

ORDER to show cause why a writ of *ne exeat* granted against the defendant should not be discharged, or the amount of his bail reduced. The bill, filed in September, 1833, stated that the defendant, in March preceding, had agreed with the complainant, as manager of the Italian theater in the city of New York, to sing, gesticulate, and recite in the capacity of *primo basso* in all the operas, etc., which should be ordered by the complainant in the United States, for the period of eight months, commencing November 1, following; that the defendant was to receive a specified sum fortnightly, and agreed not to act at any other theater or public hall without the complainant's consent. The bill further alleged that the complainant had entered into a contract with the trustees of the Italian opera house, under heavy penalties, to commence a series of Italian operas with a first-class company on the first of November, 1833; that com-

plainant had, at great expense, procured a company of performers in this country and in Europe; that the defendant was a skillful musician, and his place could not be supplied without great difficulty and expense; and that the defendant was about to leave for Cuba, to enter upon an engagement to play in Havana, in violation of his said agreement with the complainant; wherefore a specific performance of the contract was prayed, and that the defendant might be decreed to sing, gesticulate, and recite, in the capacity of *primo basso*, according to his agreement, and that a writ of *ne exeat* issue. Defendant denied the engagement to go to Havana, but did not deny his intention to go there; but stated that he had a three years' engagement with one Montresor, not yet expired, and that he was induced to enter into the contract with the complainant upon his fraudulent representation of permission from Montresor. The complainant, by affidavit, denied the misrepresentation.

W. Hall, for the complainant, to show that it was a proper case for the specific performance of a contract, cited, 1 Sim. & Stu. 607; Id. 74; 2 Vern. 322; 2 Eq. Abr. 17; 3 Atk. 515; 1 Ves. 12, 461; 3 Id. 184; 8 Id. 161, 162, 163; 3 Swans. 437; 6 Johns. Ch. 405; 3 Bro. C. C. 614; 6 Madd. 253; *Davis v. Hone*, 1 Sch. & Lef. 341; *Ormond v. Anderson*, 2 Ball & B. 369; *Costegan v. Hostler*, 2 Sch. & Lef. 166; *Hall v. Warren*, 9 Ves. 608. If this is a proper case for a specific performance, it is a proper case for a *ne exeat*: *Morris v. McNeil*, 2 Russ. 604; *Boem v. Wood*, 1 Turn. & R. 332; *Raynes v. Wise*, 2 Meriv. 472.

W. Mulock, contra. This is not a proper case for a *ne exeat*. Counsel cited 5 Ves. 591; 7 Id. 417; 3 Bro. 218; *Haffey v. Haffey*, 14 Ves. 261; *Flack v. Holme*, 1 Jac. & W. 407; *Morris v. McNeil*, 2 Russ. 604; *Grant v. Grant*, 3 Id. 598; *Leo v. Lambent*, Id. 417; *Gardner v. Edwards*, 5 Ves. 591. Neither is it a proper case for decreeing a specific performance: *Howard v. Braithwaite*, 1 Ves. & Bea. 208; *Phillips v. Duke of Bucks*, 1 Vern. 227; *Young v. Clark*, Prec. in Ch. 538; *Bochfort v. Creswick*, 2 Bro. P. C. 296; 1 Id. 171.

THE CHANCELLOR. The material facts alleged in the complainant's bill are not denied; and for the purpose of this application, they must be taken to be true. There is an affidavit annexed to the bill, that the defendant has declared his intention of going to the Havana; and the defendant has not denied such intention, although he swears he has not made any engagement to go there. Upon the merits of the case, I suppose

it must be conceded that the complainant is entitled to a specific performance of this contract; as the law appears to have been long since settled that a bird that can sing, and will not sing, must be made to sing (old adage). In this case, it is charged in the bill, not only that the defendant can sing, but also that he has expressly agreed to sing, and to accompany that singing with such appropriate gestures as may be necessary and proper to give an interest to his performance. And from the facts disclosed, I think it is very evident also that he does not intend to gratify the citizens of New York, who may resort to the Italian opera, either by his singing or by his gesticulations. Although the authority before cited shows the law to be in favor of the complainant, so far, at least, as to entitle him to a decree for the singing, I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve, which is necessary to understand and to enjoy, with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for the master to determine what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing, at least, is certain; his songs will be neither comic, nor even semi-serious, while he remains confined in that dismal cage, the debtor's prison of New York. I will therefore proceed to inquire whether the complainant had any legal right thus to change the character of his native warblings, by such a confinement, before the appointed season for the dramatic singing had arrived.

From the terms of the agreement, as stated in the bill, it is evident that there can be no breach thereof until the first of November next, when the engagement of the defendant was to commence. Even when that time arrives, the complainant will not be entitled to the defendant's services until he shall have paid, or tendered to him, a half month's salary in advance. A specific performance can not be decreed, upon the present bill, because, at the time it was filed, the complainant had no right of action against the defendant, either at law or in equity. And

I believe this court has never yet gone so far as to sustain a bill *quia timet*, because the complainant apprehended that the defendant might not be willing to perform an engagement for personal services; and where, from the peculiar nature of those services, they could not be performed until a future day. The writ of *ne exeat* is in the nature of equitable bail; and to entitle the complainant to such bail, there must be a present debt or duty, or some existing right to relief against the defendant or his property, either at law or in equity. The writ in this case therefore was prematurely granted; and the rule to discharge it must be made absolute.

NE EXEAT, WHEN GRANTED.—See *Lucas v. Hickman*, 19 Am. Dec. 44; *Mitchell v. Busch*, 22 Id. 669, in the note to which the cases appearing in this series are collated.

IN REGARD TO THE ENFORCEMENT OF CONTRACTS FOR PERSONAL SERVICES, the principal case is referred to in *Hamblin v. Dinneford*, 2 Edw. Ch. 533; *Sanquirico v. Benedetti*, 1 Barb. 315; *Robertson v. Bullions*, 9 Id. 130; *Haight v. Badgley*, 15 Id. 501; *Fredricks v. Mayer*, 13 How. Pr. 568; S. C., 1 Bosw. 231; *Daly v. Smith*, 49 How. Pr. 157; S. C., 38 N. Y. S. C. 166; *Hayes v. Willio*, 11 Abb. N. S. 173. This question is also considered in *Clark's case*, 12 Am. Dec. 212, and note thereto.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW YORK.

HOLMES v. BROUGHTON.

[10 WENDELL, 75.]

A PLEA OF FORMER RECOVERY IN ANOTHER STATE, and satisfaction of the judgment by a proceeding unknown to the common law, but alleged to be authorized by the statute of such state, should set out the statute, that the court may see how such proceedings constitute a bar to the plaintiff's action.

JUDICIAL NOTICE OF LAWS OF A SISTER STATE at variance with the common law, can not be taken.

DEMURRER to defendant's plea of former recovery to plaintiff's declaration in debt. They alleged a recovery for the same cause of action by the plaintiff against the defendant in the state of Vermont, and a satisfaction of the judgment by an appraisement of land upon execution; and that the proceedings under the execution were according to the laws of the state of Vermont, and were fully authorized thereby.

J. Holmes, jun., and S. Stevens, for the plaintiff.

M. T. Reynolds, contra.

By Court, SAVAGE, C. J. The question is, whether the proceedings alleged to have been had in the state of Vermont are well pleaded? It is laid down by Mr. Chitty that the courts do not *ex officio* take notice of foreign laws, and consequently they must in general be stated in pleading: 1 Chit. Pl. 221. The question arose in *Collett v. Keith*, 2 East, 261, which was an action of trespass for seizing and taking a ship at the cape of Good Hope, to wit, etc. The defendant, among other things, pleaded, that the settlement of the cape of Good Hope was

subject to foreign, to wit, Dutch laws; that the ship was within the jurisdiction of the supreme court there, and that certain proceedings were instituted and had; that the defendants, according to the foreign laws of the place, the said court having competent jurisdiction, were authorized and ordered to take and detain the ship. To this plea there was a demurrer. In deciding the case, Grose, J., said, that the plea was too general; that it was not enough to state that the vessel was within the jurisdiction of the court which was governed by foreign laws, and that certain proceedings were instituted; but the defendant should have shown what the foreign law was which gave jurisdiction to the court. The court, however, put the decision upon another defect in the plea, viz., that the defendant had not sufficiently shown his authority. The question has been directly decided in the supreme court of Massachusetts.

In the case of *Walker v. Maxwell*, 1 Mass. 103, it was held that a defendant who relies upon the statute of another state, must, in his plea, set out the statute, that the court may see whether the proceedings were warranted by the statute or not, and the general allegation that the proceedings were pursuant to the statute is not sufficient. That was an action on a promissory note, so called in the declaration, by which Lyon and Maxwell promised the plaintiffs, by the name of James Chase & Co., to pay them thirty-five dozen wool cards on a certain day. Maxwell defended and pleaded that an action was brought by one Cole, in the common pleas of Bristol county, in the state of Rhode Island, against Chase, one of the plaintiffs in this action, upon a certain note which is set forth, of which Cole was indorsee, and that Cole, pursuant to the statute of the state of Rhode Island in such case made and provided, directed the sheriff to serve the original writ upon the defendants, Lyon and Maxwell, for the purpose of attaching the personal estate of Chase in their hands; that in pursuance of the statute aforesaid, service was so made that Lyon and Maxwell, pursuant to the statute aforesaid, appeared and submitted to examination, etc.; that judgment was rendered in favor of Cole against Chase, as appears by the record; and further, that Cole prosecuted an action in the said court, in pursuance of the statute aforesaid, against the defendants, Lyon and Maxwell, upon the note now declared on, and set forth the proceedings against Chase, and judgment; whereby Lyon and Maxwell became liable to pay the value of the wool cards attached as aforesaid, etc., stating a judgment in favor of Cole against Lyon and

Maxwell for the amount, etc. To this plea the plaintiff demurred, and assigned several causes of demurrer, one of which is, that it does not appear by the plea what the said statute or law is, which is mentioned as a statute in said plea, nor by what law or authority the court of common pleas in Bristol county, in Rhode Island, gave the judgment described in the plea. The whole court were of opinion that the plea was bad for the cause assigned; they said that the plea should have set forth the statute of Rhode Island, that the court might see whether the proceedings stated in the plea were authorized. That the common law might be considered common to both states, and regulating the proceeding of courts of justice in both; but the proceedings stated in the plea being of a peculiar kind, and so different from the common law, the statute ought to be shown to them, and the general allegation, that the proceedings were pursuant to the statute of Rhode Island, was not sufficient.

The case of *Pearsall v. Dwight*, 2 Mass. 84 [3 Am. Dec. 35], shows what is considered sufficient in that state. There the defendant pleaded the statute of limitations of the state of New York; the part of the statute upon which he relied was pleaded with a profert of the exemplification of the whole statute, with necessary averments, and it was held by Parsons, C. J., that, notwithstanding the profert of the exemplification of the statute, the court could not take notice of any part of the statute not shown in the plea; that if the opposite party relied on any part of the same statute, he should have prayed oyer and spread the whole statute upon the record. Again, in the case of *Legg v. Legg*, 8 Mass. 99, the same court declare that they could not judicially take notice of the laws of Vermont, and that upon the point there stated, which was a common law question, they must presume the laws of Vermont to be similar to their own. The doctrine of this highly respectable court seems to me to be sound, and if so, the plea in this case is defective in not setting forth the statute of Vermont, if any, authorizing the proceedings stated to have taken place, that the court may see how those proceedings constitute a bar to the plaintiff's action. This court can not take judicial cognizance of any of the laws of our sister states at variance with the common law. The proceedings stated are not common law proceedings, and the authority for them must be specially set forth.

Judgment for plaintiff on demurrer, with leave to defendant to amend on payment of costs.

THE LAWS OF ANOTHER STATE MUST BE PROVEN AS FACTS, otherwise they will be presumed to be in accordance with the common law: *Bradley v. Mut. Benefit Ins. Co.*, 3 Lans. 343; *Philips v. James*, 1 Abb. Pr., N. S. 312; S. C., 3 Rob. 722; *Throop v. Hatch*, 3 Abb. 27; *Leuvenworth v. Brockway*, 2 Hill, 203 (n.); *Pomeroy v. Ainsworth*, 22 Barb. 129; *McCraney v. Alden*, 46 Id. 274; *Stokes v. Macken*, 62 Id. 149; *Merchants' Bank of N. Y. v. Spalding*, 9 N. Y. 63; *Seymour v. Sturgess*, 26 Id. 139; *Henry v. Root*, 33 Id. 554. See the note to *State v. Twitty*, 11 Am. Dec. 782 *et seq.*, for a collection of the authorities on this question.

LAWRENCE v. HUNT.

[10 WHEDELL, 80.]

TO RENDER A FORMER RECOVERY ADMISSIBLE IN EVIDENCE, the verdict or judgment must be between the same parties, or those claiming under them; a verdict or judgment is not binding upon a third person who has not had an opportunity to make a defense, or to appeal from the judgment if erroneous.

PARTIES TO FORMER PROCEEDING DIFFERENT.—A former recovery is admissible, where the party against whom it is offered was sued jointly with another in such former proceeding, and had an opportunity of contesting it, although that other is not a party to the subsequent action.

THE JUDGMENT OF A COURT OF CONCURRENT JURISDICTION, or one in the same court directly on the same point, is as a plea in bar, and as evidence, conclusive between the same parties upon the same matter directly in question in another suit; but is no evidence of matters which come collaterally in question merely, nor of matters incidentally cognizable, or to be inferred only by argument or construction from the judgment.

ASSUMPT. The plaintiff Lawrence proved a contract between himself and Hunt, by which the latter agreed to deliver to the former five hundred bushels of wheat as wanted, at the price of five shillings six pence per bushel, payable in seven months from May 1, 1828; that Hunt delivered about one hundred and eighteen bushels between May 1 and July 1, for which the plaintiff gave his receipts, and then refused to deliver the residue; and that wheat at harvest time, in 1828, was worth ten shillings six pence per bushel. The defendant Hunt then produced in evidence the record of a judgment recovered by him against Lawrence and one Baldwin, from which it appeared that Hunt had sued Lawrence and Baldwin on a certain contract for the sale and delivery to them, at five shillings six pence per bushel, of all the corn, rye, and wheat he could spare; that he had proved the delivery of a quantity of corn, rye, and wheat, the delivery of the latter being shown by the receipts given by Lawrence. The amount of Hunt's recovery

in the former action does not appear; but it seems that it had been objected that no recovery ought to be had for the wheat, the defendants in that action urging that the contract in respect to it was with Lawrence alone.

To the admission of this record the plaintiff objected, but was overruled; and on a verdict being found for the defendant, the plaintiff moved for a new trial.

H. Welles, for the plaintiff.

E. Van Buren, contra.

By Court, NELSON, J. The questions presented for consideration in this case are as to the admissibility and effect of the former recovery by the present defendant.

The objection that there was another party to the record in the former cause jointly with the present plaintiff, I am of opinion, is not of itself sufficient to exclude the record under the circumstances which appeared at the trial. The general rule undoubtedly is, that the verdict or judgment must be between the same parties or those claiming under them, and that a verdict or judgment is not binding upon a third person who has not had an opportunity to make a defense, or to appeal from the judgment, if erroneous. Neither can a stranger give in evidence the verdict or judgment against a party to the record, because, had such stranger been a party to the former trial, the evidence and result might have been entirely different. The reasons for the exclusion of the record in the last case would seem to have some application to the present, for although the plaintiff had an opportunity to defend the former suit, yet it was in conjunction with a third person, which fact might have varied the evidence, and embarrassed the defense. Be this as it may, I think it can not be doubted that if the wheat upon the contract in question had been the only subject of dispute in the former suit, and the plaintiff had recovered upon the merits, it would have put an end to the litigation. Two facts would necessarily have been established by it, to wit, the liability of both defendants, and the fulfillment of the contract by the plaintiff. Without these, he would not have been entitled to recover, and while they remained, found by the former verdict, the present plaintiff could not have recovered damages for the non-performance by the present defendant of his part of the contract; the subject would be *in rem judicatum*. Any other conclusion might present the anomaly of two adverse recoveries by the respective parties upon the same subject-matter and evidence; the present

defendant in the one case recovering the value of the wheat, on the ground of the fulfillment of the contract, and the present plaintiff in the other recovering damages for the non-fulfillment of the contract by the defendant. This case may be distinguished, perhaps, from the one to which I have supposed it, as above, somewhat analogous, upon this ground: that as to the joint liability or partnership, the present plaintiff had every opportunity of contesting it which can exist in any case where that fact is attempted to be established, and when found against him, it is conclusive as between him and the adverse party. So far, then, as the contract or subject-matter of the former suit is involved in the subsequent one in judgment of law, it should be deemed to be between the same parties.

Admitting the record was properly given in evidence, the next question is as to its effect upon the rights of the parties. This subject has recently undergone a full examination in this court, and in the court for the correction of errors in the case of *Jackson, ex dem. Genet, et al. v. Wood*, 3 Wend. 27; 8 Id. 9; and I consider the following positions to be settled by the result of that case, and which are particularly applicable here: First, that the judgment of a court of concurrent jurisdiction, or one in the same court directly on the point, is as a plea in bar, and as evidence in certain cases, conclusive between the same parties upon the same matter directly in question in another court or suit; but is no evidence of a matter which comes collaterally in question merely, nor of matter incidentally cognizable, or to be inferred only by argument or construction from the judgment. This, it will be perceived, is a reiteration of the position laid down in the case of the *Duchess of Kingston*, by De Gray, C. J., with a qualification as to the effect of the former recovery when given as evidence on the trial. The extent of this qualification will be found in the opinion of the chancellor in *Jackson v. Wood*, 8 Wend. 35,¹ and in the authorities by which it is sustained. Second, that if it does not appear from the record that the verdict and judgment in the former suit were directly upon the point or matters which are attempted to be again litigated in the second action, the fact may be shown *aliunde*, provided the pleadings in the first suit were such as to justify the evidence of those matters, and that it also appeared that when proved, the verdict or judgment must necessarily have involved their consideration and determination by the jury. In *Jackson v. Wood*, the record of the former judgment of *The Manhattan Co. v.*

1. *Wood v. Jackson ex dem. Genet*, 8 Wend. 35; 22 Am. Dec. 603.

Osgood et al. did not of itself show that the validity of the deed under which the lessors of the plaintiff in the case claimed to recover, was in issue, and was necessarily passed upon by the jury, and the judgment was reversed because the circuit judge excluded the parol evidence offered to prove that this was the only fact or question before the jury on that trial. That parol evidence was admissible to establish such a fact, was asserted in both the opinions given in the court of errors. Testing the facts in the case under consideration by the above principles, it is clear the former recovery was inadmissible evidence, and was not conclusive upon the rights of the parties.

The *onus* of the proof, that the subject-matter of this suit was directly in issue in the former, and the verdict for the plaintiff necessarily involved a determination of the rights of the parties upon the wheat contract on the merits, lay upon the defendant. The converse of all this was shown by him. On that trial he sought to recover for wheat, rye, and corn. The defendant set up in defense: 1. That the contract, as to the wheat, was different from the one relied on for the recovery, and made with only one of the defendants. 2. That the plaintiff had not fulfilled his part of the contract. The plaintiff recovered a verdict, but whether for the wheat, rye, or corn, can not appear. It may have been for the latter articles, for if the jury had been with the defendants, as to the wheat, for aught appearing, the plaintiff would still have been entitled to the verdict. The jury are not to be examined as to the grounds of their verdict. If the former suit had been brought for the sole purpose of recovering the value of the wheat, upon the facts as they appear, the verdict for the plaintiff would have been conclusive upon the parties; it must then necessarily have established the joint liability of the defendants, and the fulfillment of the contract by the plaintiff, and, consequently, while those facts remained adjudged, there could be no pretense of claim for damages upon the same contract by the present plaintiff. The case would then have come directly within the principle which I have first above extracted from the case of *Jackson v. Wood*.

New trial granted; costs to abide event.

RES ADJUDICATA.—The principal case is cited, on the general principle it announces in regard to the conclusiveness of a judgment, in *Embury v. Conner*, 3 N. Y. 522; *Dunkel v. Wiles*, 11 Id. 427; *Davis v. Tallcot*, 12 Id. 188; *Sweet v. Tuttle*, 14 Id. 473; *Campbell v. Consalus*, 25 Id. 617; *Vaughan v. O'Brien*, 57 Barb. 496; *Burwell v. Knight*, 51 Id. 270; *Royce v. Burt*, 42 Id. 663; *Harris v. Harris*, 36 Id. 95; *Tynj v. Clarke*, 9 Hun, 274; *Frantz v.*

Ireland, 4 *Lana*. 283; *People v. Stephens*, 51 *How. Pr.* 235, 243. See, also, *Montenquieu v. Heil*, 23 *Am. Dec.* 471, and the note referring to decisions upon this general question appearing in this series.

JUDGMENTS AS EVIDENCE WHEN FORMER ACTION INCLUDED OTHER PARTIES.—The objection to a judgment, otherwise admissible in evidence, that the parties were not the same in both suits, is not sustainable. The doctrine of the principal case, in this respect, is supported by recent adjudications and by subsequent decisions in New York: *Thompson v. Roberts*, 24 *How. U. S.* 233; *Davenport v. Barnett*, 51 *Ind.* 329; *Sweet v. Tuttle*, 14 *N. Y.* 473; *Krekeker v. Ritter*, 62 *Id.* 374; *Girardin v. Dean*, 49 *Tex.* 243; *State v. Jumel*, 30 *La. An.* 861; *Wells on Res Judicata*, 14.

"SUITS NOT INCLUDING ALL FORMER PARTIES.—A diversity of opinion exists in reference to the effect of a judgment or decree in a subsequent action in which some, but not all, of the adversary parties to such judgment or decree are litigant. Parke, B., in the course of the argument before him in *Christy v. Tancred*, 9 *Mee. & W.* 438, said: 'There is no authority that a judgment against A. and B. jointly is evidence in an action against A. alone, because it may have proceeded on an admission of B., which might, or might not, be evidence against A., according to circumstances.' On the other hand, it is stated, with the utmost confidence, that a judgment in the case of A. v. B. and C. will be allowed to be set up as an estoppel in a suit between A. and B., and that this furnishes an exception to the general rule, that the judgment must have been between the same parties: *Lawrence v. Hunt*, 10 *Wend.* 80; *Ehle v. Bingham*, 7 *Barb.* 494; *Dows v. McMichael*, 6 *Paige*, 139; *Thompson v. Roberts*, 24 *How. (U. S.)* 233. This exception seems to be consistent with the general rule. It violates none of the principles usually applied to estoppels, but, on the contrary, is supported by those principles and the considerations of public policy on which they are based. The former adjudication ought not to be any less conclusive on the adverse parties, A. and B., because other persons shared with them the advantages and disadvantages of the former suit. The matter could have been as efficiently litigated as though A. and B. were the sole parties in interest, and the opportunity for the settlement of their controversy having been so given, there is no reason why their controversy should be reopened.

"BETWEEN ADDITIONAL PARTIES.—A difference of opinion is also manifest in relation to the effect of a judgment in a subsequent action in which other persons as well as the parties to the judgment are litigant. According to the opinion given in 2 *Smith's Leading Cases*, p. 683: 'A judgment against a co-contractor, co-obligor, or copartner, will not be evidence where another is joined.' This seems, in most cases, to be perfectly reasonable. Otherwise, the party now joined will either be benefited by a decision which could not have prejudiced him, if it had gone the other way, or bound by an adjudication which he had no opportunity to resist. But it has been held that a judgment in favor of A. is admissible evidence in a subsequent controversy involving the same questions, and in which A. and B. are plaintiffs, though B., then being disinterested, was a witness at a former trial: *Blakemore v. Canal Co.*, 2 *C. M. & R.* 133. If an action be brought against a portion of several joint promisors, and they, waiving the nonjoinder of the others, proceed to trial and recover on the merits, the judgment is admissible in favor of the defendants in a future action against all the promisors on the same promise: *French v. Neal*, 24 *Pick.* 55. In this instance it happens that persons not bound by a former suit are entitled to avail themselves of its benefits, because their liability can not, against their objection, continue after

that of their co-contractors had ceased; and because the defendants in the former suit must either be deprived of the fruits of their litigation, or those fruits must also be given to persons who are not parties to the suit. Besides, if the plaintiff established his cause of action against the joint promisors sued, he could not, under the operation of the law of merger, recover against any other of the promisors. To deny the effect of the judgment as an estoppel in a future action against all the promisors, would place him in a better position than if the judgment had been in his favor. For the reason that a joint debt can not be severed, it may happen that a party is not prejudiced by a judgment by which he would otherwise be bound. Thus where, in an action against A., a town being summoned as trustee, answered that it owed A. and B.; and judgment was thereupon entered up against it for the amount, it was held this judgment can not defeat a subsequent action by A. and B. for the same amount: *Hawes v. Walkham*, 18 Pick. 451." *Freeman on Judgments*, §§ 160, 161."

The effect of a judgment against parties jointly, or jointly and severally, interested in the subject-matter of the litigation, is thus concisely stated by Mr. Justice Clifford in *Sessions v. Johnson*, 95 U. S. 347, and followed in *United States v. Ames*, 99 Id. 45:

"Even without satisfaction, a judgment against one of two joint contractors is a bar to an action against the other within the maxim *transit in rem judicatam*; the cause of action being changed into matter of record which has the effect to merge the inferior remedy in the higher: *King v. Hoare*, 13 Mees. & W. 504. Judgment in such a case is a bar to a subsequent action against the other joint contractor, because the contract being merely joint, there can be but one recovery; and consequently the plaintiff, if he proceeds against one only of two joint promisors, loses his security against the other, the rule being that by the recovery of the judgment the contract is merged and a higher security substituted for the debt: *Robertson v. Smith*, 18 Johns. 477; *Ward v. Johnson*, 13 Mass. 149; *Cowley v. Patch*, 120 Id. 138; *Mason v. Eldred*, 6 Wall. 231. But the rule is otherwise where the contract or obligation is joint and several, to the extent that the obligee or promisee may elect to sue the obligors or promisors jointly or severally; but even in that case the rule is subject to the limitation that if the plaintiff obtains a joint judgment, he can not afterwards sue them separately, for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy. Different modifications of the rule also arise where the controversy grows out of the tortious acts of the defendants. Where a trespass is committed by several persons, the party injured may sue any or all of the wrong-doers, but he can have but one satisfaction for the same injury, any more than in an action of assumpsit, for a breach of contract. Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrong-doers jointly, or he may sue them all or any of them separately; but if he sues them all jointly and has judgment, he can not afterwards sue any of them separately; or if he sues any one of them separately, and has judgment, he can not afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy. Where the injury is tortious, the remedy may be joint or several, but the rule in this country is that a judgment against one without satisfaction is no bar to an action against any one of the other wrong-doers: *Lovejoy v. Murray*, 3 Wall. 1; S. C., 2 Cliff. 196; *Livingston v. Bishop*, 1 Johns. 290; *Drake v. Mitchell*, 3 East, 258."

HUNT v. WICKWIRE.

[10 WHEDELL, 102.]

UNLESS A CAUSE IS TRIED AT THE APPOINTED TIME, or within one hour, as a general rule such omission amounts to a continuance, and the cause is out of court.

IDEAL.—If the justice is engaged at the hour in trying another cause which occupies him till after the time, it is a good reason for the delay, and he may proceed, if he does so, as soon as possible after his other official engagements are disposed of.

IDEAL.—Where a cause in the justice's court is adjourned until one o'clock of a certain afternoon, and the justice is detained by other official duties until after five o'clock of the same day, up to which time the defendant had waited, the justice may proceed with the trial, although the defendant has departed.

ACTION for false imprisonment. The plaintiff, Hunt, had been arrested upon an execution issued under a judgment recovered as follows: A suit brought by Wickwire against Hunt had been adjourned to one o'clock on the fourth of March; at that hour Hunt attended with his witnesses, and remained there until five o'clock, when the justice, Foot, the co-defendant in this action, not appearing, Hunt departed. After his departure, the justice arrived, and proceeded with the cause to judgment and execution against Hunt. On the fourth of March a town meeting had been held, at which the justice was one of the presiding officers, and the business of the meeting was the cause of his detention. Some evidence was given in the present action that the parties had agreed, on discovering that a town meeting was to be held, to try their case after the meeting had closed. The judge left this to the determination of the jury, intimating, but not instructing them, that the justice had the right to proceed and try the cause on his return from the town meeting. Verdict for the defendants. Motion for a new trial.

P. Gridley, for the plaintiff.

C. P. Kirkland, contra.

By Court, SAVAGE, C. J. It is in general true, that unless a cause is tried at the time appointed, or within one hour, such omission amounts to a discontinuance, and the cause is out of court; but this is not universally so. If the justice is engaged at the hour in trying another cause which occupies him till after the time, that is a good reason for the delay, and no rights are lost to either party. The justice may proceed, if he does so, as soon

as possible after his other official engagements are disposed of. I can see no good reason why any official duty of the justice is not a good excuse for the postponement of the trial. In this case the judge was right, however, in putting the case to the jury upon the proof of the agreement that the cause might be tried after the adjournment of the town meeting. That the time was not misapprehended, and supposed to be the next day, is proved by the fact that the defendant appeared in the afternoon of the first day of the town meeting. Besides, it is very unusual that a town meeting continues more than one day. The verdict is fully sustained by the evidence, and there is no ground for granting a new trial. Whether the discontinuance in such cases is absolute so as to make the justice a trespasser, or whether it only subjects his judgment to reversal for irregularity, are questions which need not now be discussed. In *Horton v. Auchmoody*, 7 Wend. 200, it was held that when a justice acts without acquiring jurisdiction, he is a trespasser; but having jurisdiction, an error in judgment does not subject him to an action. He acts judicially, and is entitled in such cases to protection.

New trial denied.

IF A JUSTICE DENYING A MOTION for the adjournment of a cause, depart from the place of trial, to be absent for an uncertain period, informing the parties that it was uncertain whether he could proceed with the trial that day, and that he could not tell when he should return, a discontinuance of the suit will result, and the justice will lose jurisdiction to further proceed therein, against the will of the parties: *Lynety v. Pendegrast*, 2 E. D. Smith, 43, 45. An unauthorized adjournment by the clerk amounts to a discontinuance: *Mayor of New York v. Hutton*, 2 Hill, 7, 8.

ROOT v. CHANDLER.

[10 WENDELL, 110.]

TRESPASS DE BONIS BY BAILOR.—A bailor, who loans his horses, has a constructive possession, which will support an action of trespass *de bonis asportatis*.

TRESPASS DE BONIS WILL LIE AGAINST ONE WHO DIRECTS an officer to detain property and indemnifies him for such taking.

IN TRESPASS DE BONIS ASPORTATIS, evidence of justification is inadmissible under the general issue.

TRESPASS *de bonis asportatis*. The plaintiff had loaned two horses to Rice and Goss to enable them to retail fish, not beyond a certain town. Goss took the horses farther than that town,

and they were seized under executions against Rice. The defendant and others of Rice's creditors met and requested the sheriff to detain the property, and agreed in writing to indemnify him. This writing was admitted in evidence, and it reciting that the horses had been seized by a constable, etc., the defendant claimed a justification under the process. This evidence was rejected, the general issue merely having been pleaded. The defendant moved for a nonsuit, which was denied, and a verdict directed for the plaintiff. Motion for a new trial.

M. T. Reynolds, for the defendant.

A. Taber, *contra*.

By Court, SAVAGE, C. J. The questions raised in this case are: 1. Whether the plaintiff had a sufficient possession to maintain trespass; 2. Whether the defendant was liable in this action; and, 3. Whether the defendant should have been permitted to prove, under the general issue, that the horses belonged to Rice, and that they were sold upon executions against him.

1. Upon the first question there can be no doubt. The plaintiff had the general property in the horses; he lent them to Rice to go to Clarence, but no further; he had a right to reduce the property to his actual possession whenever he pleased; he was therefore constructively in possession, and the action on that ground is well sustained.

2. The defendant, with others, directed the detention of the property, and it was sold for the benefit of the defendant and the others. It is true, that the defendant had no agency in the first taking of the property; but within a short time, and probably within a few hours, from the language of the witness, the creditors of Rice, of whom the defendant was one, had a consultation, and directed the constable to detain the horses. It is evident that the officer had not resolved to detain the horses until he had the direction from the defendant and the other creditors of Rice, nor would he sell them without being indemnified. I think, therefore, the jury were justified in finding the defendant guilty of the taking the property. It is clear that, but for the interference of the defendant and the others, the plaintiff would not have been deprived of his property.

3. The taking of the horses was not justified; there was no legal evidence of any process authorizing the seizure of the

property, nor could the defendant be permitted to give such evidence under the pleadings. In *Demick v. Chapman*, 11 Johns. 132, the action was like this, trespass *de bonis asportatis*, and the plea not guilty. The defense offered was similar to that offered in this case—that the property had been seized by virtue of process against the person who had fraudulently conveyed it to the plaintiff. This court said that the excuse that the property was taken by virtue of an attachment, should have been specially pleaded; that matter of justification or excuse at common law must be pleaded, and can not be received in evidence under the general issue. The reason of the rule is to prevent surprise: 1 Chit. Pl. 492; 1 Saund. 298, note 1; 7 Cow. 35.

New trial denied.

ONE WHO DIRECTS AN OFFICER TO COMMIT A TRESPASS is liable in trespass. On this principle, the above decision is followed in *Herring v. Hop-pock*, 15 N. Y. 413; S. C., 3 Duer, 27; *Weber v. Ferris*, 37 How. Pr. 102; S. C., 2 Daly, 405; see *Caldwell v. Sacra*, 12 Am. Dec. 285 and note.

JUSTIFICATION IN TRESPASS should be specially pleaded: *Newberry v. Lee*, 3 Hill, 527. The same rule applies in cases of trespass *quare clausum fregit*: *Carson v. Wilson*, 19 Am. Dec. 368.

ABSOLUTE OWNER HAS A SUFFICIENT CONSTRUCTIVE POSSESSION TO SUSTAIN TRESPASS: *Ash v. Putnam*, 1 Hill, 306; *Cary v. Hotailing*, Id. 314; and as against a wrong-doer, possession is sufficient: *Kissam v. Roberts*, 6 Bosw. 163. As to possession being necessary to enable one to support an action of trespass *quare clausum fregit*, see *McClain v. Todd's Heirs*, 22 Am. Dec. 37, and the references in the note thereto. Adjudications of the question of possession necessary in trespass for chattels will be also found in the same note, in *Burdick v. Murray*, 21 Id. 588, and in the note to *Orser v. Storms*, 18 Id. 546, where the subject is fully considered, and in *Van Rensselaer v. Rad-cliff*, *post*.

ELDER v. MORRISON.

[10 WENDELL, 128.]

IF AN OFFICER, IN EXECUTING A PROCESS, BE A TRESPASSER, those who aid him or act by his command are trespassers.

IF A STRANGER AIDS AN OFFICER IN DOING A LEGAL ACT, but the officer, by reason of some improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser. Where a sheriff has power to do a particular act, his authority is a justification to all who come in his aid.

SHERIFF CAN NOT COMMAND OTHERS TO DO AN UNLAWFUL ACT.—Men are bound to know the law if they obey his unauthorized commands, or if they disobey his lawful commands they act at their peril.

INDEMNIFYING AN OFFICER DOES NOT CONFER on him any authority which he did not have before.

ONE WHO, IN AID OF AN OFFICER and in obedience to commands which he had no power to make, lays hands on another, is liable for an assault and battery.

ASSAULT and battery. Plea, the general issue, with notice of special matter. Morrison, while about to sell two horses at public auction, on the premises of one Milburn, was approached by Woodward, a constable, with an execution against Milburn, and demanded the horses. Morrison refused to yield them, whereupon the constable called on the bystanders, and especially the defendant Elder, to aid him, threatening him with a prosecution if he refused. Elder came to the officer's assistance and laid hands on Morrison, who held one of the horses by the bridle, and in the struggle which followed, threw him to the ground, which was the act complained of. The defendant proved the rendition of the judgment against Milburn, the issuance of the execution, and the giving to the officer an indemnity bond; and that Milburn had said, at the time of the levy, that the horses were his own. The plaintiff was allowed to prove, against the defendant's objection, that he, plaintiff, was the owner of the horses at the time of the levy. Verdict for the plaintiff for twenty-five dollars, and judgment. The defendant sued out a writ of error.

A. Dimmick, for the plaintiff in error.

W. J. Street, contra.

By Court, SAVAGE, C. J. For the plaintiff in error, it is argued that the officer, when indemnified by the plaintiff in the execution, is bound to sell the property; and that by the revised statutes, 2 Rev. Stat. 441, sec. 80, it is enacted, that when a sheriff or other public officer shall find resistance, or have reason to apprehend it, in the execution of any process delivered to him, he may command every male inhabitant of his county, or as many as he shall think proper, to assist him in overcoming such resistance, and in seizing and confining the resisters. The statute further requires that the officer shall certify to the court from which the process issued, the names of the resisters, to the end that they may be punished for their contempt of such court: *Id.* sec. 81. And it is enacted, that every person commanded by an officer to assist him, who shall refuse, without lawful cause, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment: *Id.* sec. 82. The inference drawn by the counsel for the plaintiff in error from these premises, is, that the person who comes in aid of an officer to overcome resistance, is justified,

whether the officer is or not justified; and that the question of title to the property was not a proper subject of inquiry. On the part of the defendant in error, it is contended, that if the principal be a trespasser, all persons acting in his aid or by his command, are also trespassers; that the fair meaning of the statute is, that the officer shall be aided in the lawful execution of his process, and that such process must be against the individual whose person or property is attempted to be seized; that the process to authorize a justification must be against the person in possession of the property taken.

It is certainly true, that if the officer be guilty of a trespass, those who act by his command, or in his aid, must be trespassers also, unless they are to be excused, in consequence of the provision of the revised statutes. If a stranger comes in aid of an officer in doing a lawful act, as executing a legal process, but the officer, by reason of some subsequent improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser: Oro. Eliz. 181; Oro. Car. 446; but when the original act of the officer is unlawful, any stranger who aids him will be a trespasser, though he acts by the officer's command: *Oystead v. Shed*, 12 Mass. 511. The case in Massachusetts, just cited, was an action of trespass *de bonis asportatis* against Shed and three others; Shed and Fletcher justified as officers under writs of attachment, the two other defendants justified as servants of Fletcher; the plaintiff replied, and the defendants demurred to the replications. The court adjudged Fletcher's plea bad, and the justification of the two other defendants failed of course; and their ignorance of the law, it was said, would not excuse their conduct, or diminish in any degree the injury which the plaintiff sustained.

The case of *Leonard v. Stacy*, 6 Mod. 140, is to the same effect. That was an action of trespass for entering the plaintiff's house and taking away his goods. The defendant justified that he came in aid of an officer in execution of a writ of replevin. The plaintiff replied that he claimed property in the goods, and gave notice to the defendant before their removal. The court held the defendant was a trespasser *ab initio*, for though the claim should be made to the sheriff, yet if it be notified to him who comes in aid, that claim is made, he ought to desist at his peril; thereby establishing the proposition, that if the officer is a trespasser, all those who act by his command, or in his aid, are also trespassers. Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justi-

fication to himself and all who come in his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute, and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one. The counsel for the plaintiff in error insists that there is a difference between aiding in the original taking and in overcoming resistance. It seems to me there is no such distinction. If the taking was lawful, the resistance was unlawful; but if the taking was unlawful, the resistance was lawful. If the resistance was lawful, neither the officer nor those he commands to assist him can lawfully overcome that resistance. Nor does the fact of the officer's being indemnified confer on him any authority which he had not without such indemnity; he may thereby be compelled to do an illegal act in selling the property of strangers to the execution, but he is a trespasser in doing so, as are all others who aid him.

In any view of the subject which I can take, I am of opinion that the decision of the court of common pleas was correct, and the judgment should be affirmed.

Judgment affirmed.

Quoting the language of Chief Justice Savage, that "whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come to his aid," Mr. Justice Balcom, in *Doolittle v. Doolittle*, 31 Barb. 312, 313, said: "The rule is general, and rests on principle, that process which justifies an officer in taking property, protects all who aid him in taking the same."

TRESPASS AGAINST THOSE WHO AID AN OFFICER.—See citations upon the general question of trespass in the note to the preceding case.

PALMER v. THE PEOPLE.

[10 WENDELL, 166.]

A MAN MAY BE GUILTY OF LARCENY IN STEALING HIS OWN PROPERTY when done with an intent to charge another with its value.

INDICTMENT FOR LARCENY OF GOODS FROM A CONSTABLE may lay the property in the officer.

CERTIORARI. Palmer was accused, tried by a court of special sessions, and convicted of having stolen a lot of shingles, the property of one Jennings. It was proved that Jennings had

levied upon the shingles as Palmer's property, and allowed them to remain where they were at the time of the levy, that Palmer subsequently sold them, and charged the constable with having taken them away, saying that he, Palmer, would make the officer pay for them. Palmer did commence a suit with this object.

By Court, SAVAGE, C. J. There is no doubt a man may be guilty of larceny in stealing his own property, when done with intent to charge another person with the value of it: 2 East C. L. 558, sec. 7; 1 Hawk., c. 83, sec. 80. The constable, by levying on the shingles, had acquired a special property in them: 7 Cow. 297; 6 Johns. 196; and the charge was well laid by stating the property to be in the constable: 8 Cow. 187; 14 Mass. 217. The evidence fully warranted the conviction, and the judgment of the court of special sessions must be affirmed.

Followed in *Miller v. Adair*, 16 Wend. 349, upon the sheriff's right of action against one who takes goods levied upon, from his possession.

SUYDAM v. JONES.

[10 WENDELL, 180.]

A COVENANT OF WARRANTY RUNS WITH THE LAND and inures to the benefit of the assignee of the covenantee, who may bring an action for the breach of it, in his own name, against the original covenantor.

SUCH ASSIGNEE IS NOT AFFECTED BY THE EQUITIES existing between the original parties.

IDEM.—Therefore, in an action by an assignee of the covenant of warranty against the covenantor, the latter can not set up that the mortgage claimed to be a breach, existed at the time of the original conveyance, and that it was agreed and understood by the covenantor and the covenantee that the mortgage was to be excepted from the covenant, and should be assumed by the covenantee as part of the consideration.

A COVENANT UNDER SEAL, NOT BROKEN, can not be discharged by a parol agreement.

IDEM.—To make such a defense available, the assignee must be affected with fraud.

CONSTRUCTIVE NOTICE from the registry of a mortgage is not sufficient to charge an assignee who sues for the breach of a covenant of warranty.

ACTIONS for breach of covenants of warranty and quiet enjoyment. Plaintiff declared on the covenants in a certain deed from the defendant to one Sandford, who conveyed to the plaintiff; and alleged an eviction by one Rapelye, under a title derived neither from Sandford nor the defendant. Several special

pleas were pleaded, setting forth, in substance, that Rapelye was the purchaser at a foreclosure sale under a mortgage given several years before the conveyance to Sandford; that the mortgage was recorded; that Sandford had actual notice of such mortgage, and agreed with the defendant to pay off the same as part of the consideration; and also that the covenants of warranty and of quiet enjoyment should not be considered to extend to the mortgage. Demurrer to these pleas, and joinder.

S. Sherwood, for the plaintiff: Covenants of warranty and of quiet enjoyment run with the land, and inure to the benefit of the assignee: 4 Cru. Dig. 309, 454, tit. 32, Deed, c. 25, sec. 29; 1 Inst. 384, a; 5 Cow. 453. The assignee is not affected with any equities between the original parties of which he had not notice: *Booth v. Starr*, 1 Conn. 244 [6 Am. Dec. 233]; 1 Stra. 512; Moore, 420; Noy, 79; 1 Show. 59. The agreements set up in defense are no bar, as no agreement short of a release can annul before breach: *Kaye v. Waghorn*, 1 Taunt. 427; 2 Wils. 86; *Blake's case*, 6 Co. 43; Cro. Jac. 99; 1 Lutw. 358; 2 Roll. 96.

H. Bleeker, contra.

By Court, SUTHERLAND, J. The doctrine that a covenant of warranty runs with the land, and inures to the benefit of the assignee of the covenantor, who may bring an action for the breach of it in his own name against the original covenantor, is not questioned or denied. The only doubt upon this point which was ever entertained in this court was, whether, when a covenantor conveys with warranty, his grantee, upon eviction, could sue the original warrantor, or whether his remedy was confined to his immediate covenant of indemnity. The latter opinion was expressed in *Kane v. Sanger*, 14 Johns. 89. But the whole subject was fully reviewed and considered in *Wiley v. Mumford*, 5 Cow. 137, where the broad doctrine that the assignee may maintain an action against the original covenantor, whether the immediate conveyance to him was with or without warranty, was, upon a consideration and review of all the cases, fully established: Co. Lit. 384, b, 385, a; Cru. Dig. 452, 453; Cro. Eliz. 503; Shep. Touch. 198, tit. Warranty; 2 Mass. 460; *Booth v. Starr*, 1 Conn. 244 [6 Am. Dec. 233].

If the covenant passes to the assignee with the land, it can not be affected by the equities existing between the original parties any more than the legal title to the land itself. A cov-

enant under seal can not be discharged by a parol agreement before breach: *Kaye v. Waghorn*, 1 Taunt. 427. The discharge must be by matter of as high a nature as that which creates the debt or duty: *Preston v. Christmas*, 2 Wils. 86. This is universally true where the action is founded upon, or grows exclusively out of the deed or covenant: *Blake's case*, 6 Co. 43; *Alden v. Blague*, Cro. Jac. 99. In covenant, therefore, award with satisfaction before breach is bad, because the plea goes to the covenant itself, though after breach it may be good, for then it goes only in discharge of the damages, and not of the deed: *Snow v. Franklin*, Lutw. 108, in my ed. of 1708, cited in others as 1 Lutw. 858.

The principle that a written contract or instrument can not be essentially varied by parol, seems also to be applicable to this case, and to exclude the defense. The covenant in the defendant's deed, it is conceded, embraces in its terms the mortgage, under and by virtue of which the plaintiff has been evicted. The defense is either that at the time of executing and delivering the deed, it was understood and agreed between the parties that the covenants should not extend to that mortgage, or that after the deed was executed and delivered the grantee agreed that it should not embrace the mortgage, and *quoad hoc* discharge the covenant.

In the first point of view, the objection to the defense is, that it is attempting to show that the real contract between the parties was different from that expressed in the deed, which, upon well-settled principles, can not be done; and in the second point of view, the objection is equally fatal, as has already been shown, that a covenant before breach can not be discharged by parol.

This view of the case would seem to show that if the action had been brought by and for the benefit of the grantee himself, instead of his assignee, the defense could not be sustained at law; though there are some peculiarities in the case to which I have not particularly adverted, which, as between the original parties, might affect or vary its character: *Butler's note*, 332, to Co. Lit. 385. Even a formal technical release from the covenant by the covenantee, after the assignment, and a breach in the hand of the assignee, would not discharge it: *Middlemore v. Goodale*, Cro. Car. 503. The case must be brought within the principle of fraud, and the assignee must be affected with it, before a defense of the nature of this can be available, and perhaps even then it is not available at law. In the lan-

guage of one of the plaintiff's points, to allow a secret agreement in opposition to the plain import of a covenant running with the land, to control and annul it in the hands of a *bona fide* assignee, would be a fraud upon such assignee which the law will not tolerate. The pleas do not charge the plaintiff with any notice whatever of the secret agreement between the defendant and Sandford, nor with any actual notice of the existence of this incumbrance at the time of his purchase; though if such actual knowledge had existed, I do not perceive that it can vary or affect the case.

Judgment for plaintiff on the demurrers.

COVENANT UNDER SEAL NOT BROKEN CAN NOT BE DISCHARGED BY A PAROL AGREEMENT: *Delacroix v. Bulkley*, 13 Wend. 73; *French v. New*, 28 N. Y. 151; *Pierrepoint v. Barnard*, 6 Id. 295; *Clough v. Murray*, 3 Rob. 16; *Hart v. Brady*, 1 Sandf. 627; *Esmond v. Van Benschoten*, 12 Barb. 376. In *Greensault v. Davis*, 4 Hill, 643, on the authority of the principal case, that in an action on the covenant of warranty, brought by an assignee of the grantee, the original grantor was not at liberty to show that the consideration paid for the land was less than that expressed in the deed.

COVENANT OF WARRANTY.—See the cases collected in the note to *King v. Kerr's Adm'r*, 22 Am. Dec. 777.

CROOKER v. BRAGG.

[10 WENDELL, 260.]

DIVERTING THE FLOW OF WATER.—Where a stream of water flows around an island, one branch being very much larger than the other, the owner of a mill on the smaller branch can not place obstructions at the head of the island, so as to cause one half the stream to pass on his side.

A MAN IS ENTITLED TO THE ENJOYMENT OF A STREAM in its natural flow; it is not enough that one who has diverted the waters has left what could be utilized by expense and trouble.

ONE THROUGH WHOSE LAND A STREAM NATURALLY FLOWS is entitled to have the whole pass through it, though he may not require the whole or any part for the use of machinery.

ERROR from the common pleas. Crooker sued Bragg for taking away a dam at the head of an island. The parties had mills on opposite sides of a stream in which was an island, causing three fourths of the water to flow on Bragg's side. To raise the water on his branch, Crooker erected the dam in question, which caused so much of the water to be diverted as to stop the defendant's mills. The plaintiff claimed a prescriptive right thus to divert the water when the stream was low, and evidence was introduced by both parties on this point. The plaintiff.

iff then offered evidence to prove that his own dam was tight and the defendant's dam was leaky, wasting a great deal of water; that the dam at the head of the island turned no more water into the plaintiff's branch than was necessary for his mill; but the evidence was rejected. Plaintiff gave in evidence the declarations of one Bennett, the former owner of the mills which plaintiff now holds, made to one Gordon, in the presence of Crooker, the former owner of the defendant's mills, that he, Bennett, wanted Gordon to assist him in building a dam at the head of the island to divert some of the water, stating that he had a right to do so. To rebut the presumption arising from Crooker's silence, the defendant gave in evidence his declaration, made afterwards, that Bennett did not have such right. The declarations were not made in Gordon's or Bennett's presence; and were objected to, but admitted. Verdict for the defendant.

S. Sherwood, for the plaintiff in error.

B. F. Buller, *contra*.

By Court, NELSON, J. An attempt was made on the trial in the court below, to show that the plaintiff, and those under whom he claimed, had acquired a right by prescription to maintain the dam in question. The weight of evidence, I think, was against the right, but whether so or not, the question was submitted to the jury, and they have found against the plaintiff.

The principal ground urged for the reversal of the judgment is, that the common pleas erred in rejecting the testimony offered by the plaintiff. I am of opinion this testimony was properly rejected. The defendant was entitled to all the natural advantages which the place or site he occupied afforded him, and the plaintiff can not maintain a right to divert the stream, because by greater expense or skill there would be still sufficient water left to drive the defendant's mills, notwithstanding such diversion. If the natural advantages were such as would enable the defendant to enjoy the use of his machinery, without the expense of a dam or race-way, and the trouble of keeping them in repair, it could not for a moment be contended that the plaintiff might divert a part of the stream from the accustomed channel, because sufficient still continues to flow in it for the defendant's use if he would erect a dam and open a race-way. No such principle can be found in cases of this kind, and we are not disposed to be the first to establish it. We can not take from one party a right for the sake of the con-

venience of another, if the difficulty in the application of the principle contended for is not a sufficient objection to it. If we should admit that the defendant was bound to keep his dam so as to prevent leakage, why not require him to alter its location, erect it higher, construct a new wheel that could be driven by a less quantity of water, or in fine, comply with any other well-founded suggestion, by adopting which, he would answer all his purposes, notwithstanding a part of the stream has been wrongfully diverted from him? If this was an action by the defendant to recover damages for the diversion of the stream, the evidence perhaps might be admissible, so far as the amount he should recover was concerned; but when the question is one of mere right between the parties, I can not think it relevant or admissible. A person through whose farm a stream naturally flows, is entitled to have the whole pass through it, though he may not require the whole or any part of it for the use of machinery. Upon any other principle, this right to the stream, which is as perfect and indefeasible as the right to the soil, would always depend upon the use, and a party who did not occupy the whole for special purposes, would be exposed to have the same diverted by his neighbor above him, without remedy, and which diversion, by twenty years' enjoyment, would ripen into a prescriptive right beyond his control, and thereby defeat any subsequent use. The doctrine of Lord Ellenborough, in 6 East, 214, referred to and approved by Judge Thompson, in *Palmer v. Mulligan*, 3 Cai. 315 [2 Am. Dec. 270], is in accordance with these views.

The exception taken to the admission of the evidence in relation to the declaration made by Sampson Crooker, subsequent to the interview between Bennett and Gordon, can not be sustained; the whole of the evidence relating to this exception is quite unimportant, and when viewed in connection with the mass of testimony upon the main question, would not, if erroneous, justify a reversal of the judgment. It is unnecessary to examine the charge of the court, as it was not excepted to.

Judgment affirmed.

WATER-COURSES.—Followed, in respect to the diversion of water to the injury of another, in *Garwood v. N. Y. Cent. and Hud. R. R. Co.*, 17 Hun, 361, 363, 364. Extent of owner's right in a stream flowing through his land: see *Blanchard v. Baker*, 23 Am. Dec. 504, and cases cited in note.

NAVIGABLE WATERS, RIGHT TO SOIL UNDER: *Barker v. Bates*, 23 Id. 678, and notes.

PENTZ v. STANTON.

[10 WENDELL, 271.]

TO MAKE AN AGENT'S DRAWING, ACCEPTANCE, OR INDORSEMENT OF A BILL BINDING on his principal, the agent must either sign the principal's name, or must make it appear in some way from the face of the bill that it was executed for him.

IF A PRIVATE AGENT DRAW A BILL or enter into any other contract in his own name, without stating that he acts as agent so as to bind his principal, he will be personally bound.

THOUGH AN AGENT'S NOTE FOR GOODS SOLD DOES NOT BIND HIS PRINCIPAL, yet if the goods were actually used for the latter's benefit, and the credit was not exclusively given to the agent, the principal will be liable in an action for goods sold.

WHETHER THE CREDIT WAS GIVEN EXCLUSIVELY TO THE AGENT, is a question for the jury.

ASSUMPSIT. The first count was on a protested bill of exchange, drawn by West, agent, on one Carey, which bill was alleged to be drawn by West as the agent of the defendant in whose business the goods sold were employed; the second count was for goods sold and delivered to West, the bill of goods being made out, "Mr. H. F. West, agent, bought of W. A. F. Pentz." Verdict for the plaintiff. Motion for a new trial.

P. Gridley, for the defendant.

J. A. Spencer, *contra*.

By Court, SUTHERLAND, J. The plaintiff can not recover upon the bill of exchange against the present defendant. His name nowhere appears upon it. It was drawn and subscribed by West in his own name, with the simple addition of "agent," but without any specification whatever of the name of the principal. Mr. Chitty, in his valuable treatise on bills, says, page 22: "It is a general rule that no person can be considered a party to a bill, unless his name or the name of the firm of which he is a partner, appear on some part of it;" and Mr. Justice Buller, in *Fenn v. Harrison*, 3 T. R. 761, observes, that in the case of bills of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself; the acceptor, the drawers, and the indorsers are all liable in their turns, but they are only liable because they have written their names on the bill; but this is an attempt to make some other persons liable, whose names do not appear on the bill. In *Siffkin v. Walker & Rowlestone*, 2

Camp. 308, an action was brought against the defendants upon a promissory note given and signed by Walker, only. The declaration appears, from the argument of counsel, to have averred that Walker had authority to give the note for Rowlestone, and that it was given for their joint debt, and it appeared that the defendants were jointly indebted to the plaintiff on a charter party of affreightment, and that the note was given by Walker in satisfaction of that debt. Lord Ellenborough nonsuited the plaintiff, observing that his remedy was either jointly against both defendants on the charter party, or separately against Walker on the promissory note; and he asked, how can I say that a note, made and signed by one in his own name, is the note of him and another person neither mentioned nor referred to? And he observes further, that the import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and this note must be considered as a separate security for a joint debt. In *Emly and others v. Lye and another*, 15 East, 6, the action was upon a bill of exchange, drawn by one of the defendants (who were partners), in his own name, which was discounted by the plaintiffs, and the money went to the use of the firm; but it was held that the plaintiffs could not recover, either upon the bill or the money counts. Lord Ellenborough observed that the counts in the bill had been properly abandoned, for unquestionably, on a bill of exchange drawn by one only, it can not be allowed to supply by intendment the names of others in order to charge them; and considering it a mere discount or sale of the bill, he also held that there was no joint liability of the defendants for money had and received, and that it was the individual transaction of the partner who drew the bill; and all the other judges expressed similar opinions.

There is no doubt that a person may draw, accept, or indorse a bill by his agent or attorney, and that it will be as obligatory upon him as though it were done by his own hand. But the agent in such case must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way or another, that it was in fact drawn for him, or the principal will not be bound. The particular form of the execution is not material, if it be substantially done in the name of the principal: 1 East, 434; 2 Id. 142; 3 Esp. 266; 2 Stra. 705; Com. Dig., Attorney, C. 14; 1 Camp. 384, 485, 486; 6 T. R. 176. This doctrine is very clearly stated in *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec 15.], and in *Arfridsen v. Ladd*, 12 Id.

173. In the first of these cases the action was brought upon three promissory notes, executed by one Cook, for premiums upon policies of insurance, procured by him at the request and for the benefit of the defendant. Cook acted merely as the factor of the defendant, and intended to bind him by the premium notes; but the notes did not, on the face of them, purport to be signed by Cook on the behalf of the defendant, and he was held not to be liable upon the notes. The parol testimony, explaining and showing the real nature of the transaction, was decided to be inadmissible, on the ground that it contradicted or varied the written contract. Judge Parker, in delivering the opinion of the court, says that "no person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs." This principle has been long settled, and has been frequently recognized. "Nor do I know," he continues, "an instance in the books, of an attempt to charge a person as the maker of a written contract, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature." He also discusses at length the question of the admissibility of parol evidence in such cases to show the real character of the transaction, and holds it to be utterly incompetent, on the ground which has already been stated. *Vide also Mayhew v. Prince*, 16 Mass. 54,¹ and *Meyer v. Barker*, 6 Binn. 228.

It is well settled, that if a private agent draw a bill or enter into any other contract in his own name, without stating that he acts as agent, so as to bind his principal, he will be personally liable: *Chit. on Bills*, 36, and cases there cited; 5 Taunt. 749; 2 Marsh. 454; 5 East, 148; 1 Bos. & Pul. 368; 1 T. R. 181. It is not sufficient to charge the principal or protect the agent from personal responsibility, merely to describe himself as agent, if the language of the instrument imports a personal contract on his part: 5 Mass. 299; 6 Id. 58; 8 Id. 103; 1 Gall. 630; *Chit.* 52; 9 Cranch, 155. But where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal and not the agent will be bound: *Bathbone v. Budlong*, 15 Johns. 1; *Owen v. Gooch*, 2 Esp. 567; *Mott v. Hicks*, 1 Cow. 513 [13 Am. Dec. 550], and the cases there

referred to in the opinion of the judges; *Rossiter v. Rossiter*, 8 Wend. 494 [24 Am. Dec. 62].

The next inquiry is, whether the defendant is liable upon the counts for goods sold and delivered. West was examined as a witness, and testified that he was the agent of the defendant in carrying on a woolen machinery in Oneida county; that the goods for which he gave the bill were purchased for the defendant, and were used in his business of manufacturing; that he had authority to draw bills of exchange and notes in the name of the defendant; that when he called for the goods in this case, he proposed to let the plaintiff have the draft in question; that the plaintiff said he would inquire about the drawee, and did so, and afterwards received the draft from the witness, and gave the receipt at the bottom of the bill. It does not appear that West disclosed to the plaintiff the fact that the goods were purchased for the defendant. The bill of goods delivered to him was headed, W. H. West, agent, and the draft which he gave was also signed by him as agent.

These are the only circumstances showing the mutual understanding of the parties that West was acting as agent, and not as principal in the transaction. It was shown that payment of the bill had been regularly demanded of the drawee, and notice of its dishonor regularly given to West, the drawer. This would entitle the plaintiff to resort to the common count as against West, if he were the defendant, and it had been a transaction unquestionably on his own account: *Jones & Mann v. Savage*, 6 Wend. 659, 662. The question then upon this branch of the case is, whether the goods were sold to West exclusively upon his own individual credit, and the credit of the bill which he drew, so as to prevent the plaintiff from all remedy against the defendant, for whom they were in fact purchased, and who has had the exclusive benefit of them. The only additional evidence upon this point not already adverted to, is the letter written by the plaintiff to West on the twenty-ninth of September, 1826, advising him of the dishonor of the bill by the drawee, and requesting him to make provision for its payment. I do not think that this is a circumstance of much importance in the case. The communication would, of course, be made to West, and he would be called on for payment, admitting that he was known and considered by the plaintiff as a mere agent, as a matter of necessity; and it does not appear that the plaintiff knew who the principal was. It was a question for the jury to decide, whether the goods were sold exclusively upon the credit of West

and of the bill, or not: *Bentley v. Griffin*, 5 Taunt. 356; 1 Com. L. R. 131; *Leggat v. Reed*, 1 Car. & P. 16; 11 Com. L. R. 301,¹ and cases stated in note; and it is to be regretted that it was not distinctly left to them by the judge. Upon the evidence, I think the jury would have been justified in finding for the plaintiff on this point. The plaintiff certainly knew that West was acting as agent for some third person. The bill of goods was made out to him as agent, and the draft which he received was signed by West as agent. It would not be an unreasonable conclusion from these facts, that the plaintiff did not repose entirely upon the security and responsibility of West, but had regard to the eventual liability of the principal, whoever he might be, if it should become necessary to resort to him. If the plaintiff should fail in this action, on the ground that credit was given exclusively to West, then, no doubt, he could recover in an action against West; and it is equally clear, that whatever money West may be compelled to pay on this account, would be money paid to the use of the defendant, and which he might recover from him. The defendant must eventually pay for these goods, and I see no legal objection to a recovery against him in this action upon the common counts.

Motion for a new trial denied.

LIABILITY OF PRINCIPAL ON AGENT'S WRITTEN CONTRACTS.—In the recent decision of *Briggs v. Partridge*, 64 N. Y. 357, 362, Judge Andrews, expressing the opinion of the court, gave the following exposition of the law regarding the liability of principals on written contracts entered into by their agents: "The plaintiff invokes in his behalf the doctrine that now must be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a parol executory contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed he was acting for himself, and this doctrine obtains as well, in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity: *Higgins v. Senior*, 8 Mee. & W. 834; *Trueman v. Loder*, 11 Ad. & EL. 594; *Dyer v. Townsend*, 24 N. Y. 61; *Coleman v. First Nat. Bank of Elmira*, 53 Id. 593; *Ford v. Williams*, 21 How. 289; *Huntington v. Knox*, 7 Cush. 371; *The Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Hubbert v. Borden*, 6 Whart. 91; *Browning v. Provincial Ins. Co.*, 5 L. R. (P. C.) 263; *Calder v. Dobell*, 6 Id. (C. P.) 486; *Story on Agency*, secs. 148, 160.

"It is doubtless somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge, or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases, the doctrine that a written contract of the agent could be enforced against the principal was stated with the qualification that it applied, when it could be collected from

the whole instrument, that the intention was to bind the principal. But it will appear from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown; and I am of opinion, that the practical effect of the rule as now declared, is to promote justice and fair dealing. There is a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are supposed to take them on the credit of the parties whose names appear upon them; and a person not a party can not be charged, upon proof that the ostensible party signed or indorsed as his agent: *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94; S. C., 20 Am. Dec. 684; *Pentz v. Stanton*, 10 Id. 271; *De Witt v. Walton*, 9 N. Y. 571; *Stackpole v. Arnoll*, 11 Mass. 27; S. C., 6 Am. Dec. 150; *Eastern R. R. Co. v. Benedict*, 5 Gray, 586; *Beckham v. Drake*, 9 Mea. & W. 79." Other decisions of this court approving the principal case are *Snelling v. Howard*, 51 N. Y. 377; *Meeker v. Claghorn*, 44 Id. 351.

CONTRACT OF CORPORATION'S AGENT: *Garrison v. Combs*, 22 Am. Dec. 120; *Mott v. Hicks*, 13 Id. 561.

AGENT'S NOTE, WHEN BINDS PRINCIPAL: *Long v. Colburn*, 6 Id. 160, and note.

PEOPLE v. SHERMAN.

[10 WENDELL, 298.]

A **STAGE DRIVER** is a servant within the meaning of the act punishing, as felonious stealing, the embezzlement of property received by virtue of employment as a servant.

EMBEZZLEMENT. The defendant was indicted for embezzling a packet of bank bills, intrusted to him as stage driver by his employers, to be carried from one village to another, to be deposited in a bank there. The defendant had, on a previous occasion, carried a similar packet. The defense was, that the defendant was not a servant or clerk within the meaning of the statute. The court overruled the objection; judgment was stayed, and the proceeding removed to this court on a certiorari.

J. C. Spencer, for the defendant.

W. H. Seward, contra.

By Court, SUTHERLAND, J. The defendant was properly convicted under the count for embezzlement. The provision of the revised statutes, under which the count was framed, is sufficiently comprehensive to embrace this case: 2 Rev. Stat. 678, sec. 59. The defendant was the servant of Sprague & Demmon, and the money which he embezzled came into his possession, or under his care, by virtue of his employment as such servant,

within the meaning of the act. He drove the stage of Sprague & Demmon from Lyons to Geneva, and Sprague & Demmon contracted with the collector of canal tolls at Lyons, to send the tolls collected by him weekly to Geneva, and deposit them in the bank at that place, to the credit of the treasurer, for which they were to be paid fifty cents per package. A package had once before this been sent by the defendant, and it is to be inferred, though the fact is not expressly stated, that other drivers of Sprague & Demmon had been in the habit of taking them.

The care and custody of packages of every description are a part of the ordinary duty of servants of this description, although it is not their principal business, and it appears to me that it would defeat one very important object of the act, to restrict its application to clerks or servants whose principal or ordinary employment was the receiving and taking care of the money, goods, etc., of their employers. Neither the language nor spirit of the act requires this restricted construction.

Motion for new trial denied.

Followed in *People v. Dalton*, 15 Wend. 582, and in *Lewis v. Kendall*, 6 How. 62, as to who are servants, within the meaning of the statute, construed in the principal case.

ALLEN v. MARTIN.

[10 WENDELL, 300.]

JUDGMENT OF A JUSTICE CAN NOT BE IMPEACHED COLLATERALLY, in an action brought by the judgment debtor against the officer serving the execution.

IN A PURSUIT TO RETAKE A DEFENDANT an officer may break open an outer door of a dwelling, after making known his business, demanding admission, and being refused.

DEMAND FOR ADMISSION IS UNNECESSARY where the officer, having once gained admission, has been thrust out of the house.

TRESPASS *q. c. f.*, and for an assault and battery and false imprisonment, for bursting open plaintiff's outer door in the night-time, entering his dwelling, and carrying him off. Martin was a constable, and had arrested the plaintiff on a justice's execution; the other defendants had acted in his aid. A witness for the plaintiff testified that previous to the bursting open of the door, Martin had entered the house in the evening, clinched hold of him, saying, "I have got you, you damned scoundrel," and dragged him out of the house; a scuffle ensued; both fell

to the ground; the plaintiff broke from the constable and entered his house, and the constable went off. It further appeared that the constable procured assistance, and on the same night returned, broke open the door, seized the plaintiff, dragged him out of the house, saying nothing about having an execution against the plaintiff. The outer door was closed, but not latched. There was some evidence that the first arrest had taken place in the morning. The plaintiff also offered to prove that Martin, in serving the summons in the suit in which the executions had issued, had misread it, informing the present plaintiff that it was returnable on the eleventh of August, when it was in fact returnable on the tenth, and that in consequence he did not attend until the eleventh, when he found that judgment by default had been entered against him, and that Martin knew that the plaintiff in that suit had no just claim against the present plaintiff. This evidence was rejected. Verdict for the defendant. Motion for a new trial.

S. Stevens, for the plaintiff.

W. Hay, *contra*.

By Court, NELSON, J. The case of *Putnam v. Man*, 8 Wend. 202 [20 Am. Dec. 686], disposes of the first question. There can be no doubt the judgment before the justice can not be impeached in this collateral way, and that so far as its validity is concerned, the return of the service of the summons is conclusive, except on a direct proceeding to reverse the judgment for the irregularity. The party injured has an ample remedy, either by action for a false return, or by a writ of error.

The testimony was sufficient to prove a previous arrest and escape before the defendants broke into the plaintiff's dwelling-house for the purpose of retaking him on the execution. The language of the officer was highly discreditable to his manners and morals, but his acts were in judgment of law a legal arrest, and the defendant, now plaintiff, ought to have submitted: *Jenner v. Sparks*, 1 Salk. 78;¹ Bull. N. P. 62; *Harnes v. Battyn*, Fost. Crim. L. 320, sec. 22. In pursuit to retake the defendant, the officer had an unquestionable right to break open the outer door of the house after making known his business, demanding admission, and refusal: Fost. Crim. L. 320, sec. 22; 1 Salk. 78. There was no proof of demand and refusal in this case, but under the circumstances, such proof was not necessary. After the officer had been thrust out of the plaintiff's house,

1. *Jenner v. Sparks*, 1 Salk. 79.

and the door shut upon him, it would have been a senseless ceremony for him to have turned round, made known his business, and demanded admission. The plaintiff's conduct superseded the use and object of these steps. It was said upon the argument that the judge erred in assuming that the plaintiff forcibly turned the officer out of the house, as the fact was otherwise. I think the testimony warranted this inference, notwithstanding the evidence of the sister. But this is not very material, for whether the fact was so or not, that the plaintiff was fully advised of the purposes of the officer when he returned with the *posse* can not be doubted. Indeed, the case discloses that in the course of the day preceding the first arrest, a difficulty had occurred between the parties in reference to this execution, and the arrest of the plaintiff upon it, and which no doubt gave the harsh character, in some respects, to the subsequent proceedings. The verdict I think right, both in law and fact.

New trial denied.

SHERIFF'S RETURN IS SUFFICIENT to give the court jurisdiction; it is not impeachable in the same action. If false, the remedy of the party is by a direct proceeding against the sheriff for a false return. On the propositions, *Allen v. Martin* is followed in *Fitch v. Devlin*, 15 Barb. 49; *Hopkins v. Grinnell*, 28 Id. 532; *Haughey v. Wilson*, 2 Hilt. 260; *Sperling v. Levy*, 1 Daly, 98; S. C., 10 Abb. 427; *Col. Ins. Co. v. Force*, 8 How. 355; *Wassel v. Wiles*, 24 N. Y. 637.

BREAKING OPEN DOORS OR WINDOWS of dwelling to make a levy: *Isley v. Nichols*, 22 Am. Dec. 425; *State v. Armfield*, 11 Id. 762; *De Graffenreid v. Mitchell*, 15 Id. 648.

BREAKING OPEN STORE TO LEVY EXECUTION: *Haggerty v. Wilber*, 8 Id. 321.

ALLEN v. CRARY.

[10 WENDELL, 349.]

REPLEVIN WILL LIE AGAINST A PLAINTIFF IN EXECUTION, by whose direction it is levied upon property of a third person.

REPLEVIN LIES FOR ANY TORTIOUS OR UNLAWFUL TAKING of the property of another; it will lie where trespass *de bonis asportatis* can be sustained.

ACTUAL, FORCIBLE DISPOSSESSION IS NOT NECESSARY to maintain trespass or trover; any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damaged, is sufficient.

A SHERIFF IS A TRESPASSER who levies upon goods and chattels which are not the property of the defendant in the execution.

REPLEVIN. The defendant had sued out a plaint in replevin for certain articles of personal property which he directed the

officer to seize. The officer levied, and within an hour the same officer served this plaint, to which the defendant pleaded *non cepit*, insisting that he was not liable, as he had not taken the property, nor had it under his control. Verdict for the plaintiff.

Crary, per se, moved for a new trial.

S. Stevens, contra.

By Court, SUTHERLAND, J. The only question in this case is, whether replevin will lie against a plaintiff in an execution, by whose direction it is levied upon specific articles of property, which prove not to belong to the defendant in the execution, but are the property of a third person. Replevin will lie for any tortious or unlawful taking of the property of another; it will lie where trespass *de bonis asportatis* can be sustained. Both these points were adjudged in *Pangburn v. Patridge*, 7 Johns. 140 [5 Am. Dec. 250], and *Dunham v. Wyckoff*, 3 Wend. 280 [20 Am. Dec. 695], and cases there cited. To maintain trespass or trover, evidence of an actual, forcible dispossession of the plaintiff is not necessary; any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain either action: *Phillips v. Hall*, 8 Wend. 613, and cases there cited; 7 Cow. 735; 10 Mass. 125; 6 Wend. 368. A sheriff is a trespasser who levies upon goods and chattels which are not the property of the defendant in the execution; he acts at his peril in such cases; his process only authorizes him to seize the defendant's property: *Chapman v. Andrews*, 3 Wend. 242; and if the plaintiff in the execution direct the levy to be made, he is also a trespasser: 1 Camp. 197. The officer, in such a case, is his servant or agent, and trespass or replevin would lie against either of them. The evidence in this case shows a regular levy by the officer.

Motion for new trial denied.

AS TO WHAT DISPOSSESSION WILL SUPPORT TRESPASS OR TROVER, the principal case is cited in *Chapman v. Douglas*, 15 Abb. N. S. 428; *Brockway v. Burnap*, 16 Barb. 313; S. C., 8 How. 191; *Stewart v. Wells*, 6 Barb. 81; *Latimer v. Wheeler*, 1 Keyes, 475; *Fonda v. Van Horne*, 15 Wend. 633; *Connah v. Hale*, 23 Id. 467; *Green v. Burke*, Id. 495; *Boyce v. Brockway*, 31 N. Y. 493; *Knapp v. Smith*, 27 Id. 281, where this decision is expressly approved; *Phillips v. Hall*, 24 Am. Dec. 108.

LIABILITY IN TRESPASS OF PLAINTIFF IN EXECUTION.—On this question, the principal case is regarded as furnishing the correct rule of decision in *Knapp v. Smith*, 27 N. Y. 281; *Stewart v. Wells*, 6 Barb. 81; *Weber v. Ferris*,

37 How. 102; S. C., 2 Daly, 405; *Chapman v. Douglas*, 13 Abb. N. S. 405. See also *Root v. Chandler*, ante, 546, and note.

REFLEVIN WILL LIE WHERE PARTY MAY BRING TRESPASS.—*Neff v. Thompson*, 8 Barb. 215; *Brockway v. Burnap*, 16 Id. 313.

SHERIFF'S LIABILITY FOR LEVYING ON GOODS OF STRANGER.—See note to *Durham v. Wyckoff*, 20 Am. Dec. 695; *Phillips v. Hall*, 24 Id. 108.

HINMAN v. BORDEN.

[10 WENDELL, 367.]

A SHERIFF MUST USE ALL REASONABLE ENDEAVORS to execute process. He should inquire for the defendant at his home, and should not rely upon vague inquiries made on the street.

ERROR from the common pleas. Borden sued Hinman in a justice's court for a false return of *non est inventus*, upon a *ca. sa.* made by a deputy of Hinman, a sheriff. Before the justice the defendant had a verdict and judgment. Upon certiorari to the common pleas, the judgment was reversed. The facts on which the falsity of the return was based, appear from the opinion.

H. Denio, for the defendant in error.

J. A. Spencer, *contra*.

By Court, SUTHERLAND, J. This is a clear case of a fraudulent and false return by the defendant's deputy, and the court of common pleas very properly reversed the judgement of the justice. Even upon the testimony of the deputy himself, who was examined as a witness, there was a total want of due diligence. He says he inquired of some of the defendant's neighbors if he was at home, and was informed that he was not, but that he never went to the defendant's house, who lived in the same village; and Harris, the defendant in the execution, swears that he was at home, attending to his ordinary business, during the whole time between the delivery of the execution to the deputy and its return day; that he passed the office of the deputy frequently; that he is well known to the deputy; that he once, before the return day, saw and passed him in the street; and that on the morning of the return day he was in the sheriff's office, and there saw and conversed with the deputy; that he might at any time have been found by inquiry for him at his house.

Admitting that the plaintiff had a right to return the writ on the morning of the return day, and that if he had used due diligence before, he would not be responsible, although he might

subsequently have executed the writ if it had not been returned, still the evidence of gross negligence, at least, is decisive in the case. A sheriff is bound to use all reasonable endeavors to execute process. He should go to the house of the defendant to ascertain whether he is at home, and if not, to learn where he is—particularly where he lives in his immediate neighborhood; and if, instead of pursuing that course, he chooses to rely upon the vague information, obtained from casual inquiries in the street, that the defendant is not at home, he does it at his peril. The evidence fully warrants the belief that the deputy did not desire nor intend to arrest the defendant in the execution: 2 Rev. Stat. 382, sec. 32; 3 Camp. 46; 5 Dow. & Ry. 95; 16 Com. L. R. 232, S. C.

Judgment affirmed.

Followed in regard to the diligence necessary to be used by sheriffs in serving processes: *McArthur v. Pease*, 46 Barb. 428; *Tomlinson v. Rowe*, Hill & Denio, 412; *Forbes v. Logan*, 4 Bosw. 483; *Watson v. Brennan*, 39 N. S. Ct. (7 J. & S.) 105. Upon the question of diligence, see the cases of *Hargrave v. Penrod*, 12 Am. Dec. 201; *McDonald v. Neilson*, 14 Id. 430, and the notes to those decisions.

SLOAN v. CASE.

[10 WENDELL, 370.]

DEBT LIES AGAINST A CONSTABLE for neglecting to return an execution, without showing that he has collected money thereunder.

ON OVERRULING A DEMURRER, A JUSTICE HAS DISCRETION to allow the defendant to plead; but should such discretion be abused, the court of common pleas ought to interfere.

ERROR from the common pleas. Case sued Sloan, a constable, and his sureties, on the instrument in writing required to be given by a constable on his election. The constable had received an execution on a justice's judgment, but had wholly neglected to make any return respecting the same. The defendants admitted this to be so, but demurred generally. The demurrer was overruled. Leave to withdraw the demurrer and plead, was refused, and judgment rendered for the plaintiff for the amount of the execution, the justice certifying in his return to the certiorari, that the judgment was rendered by him upon the admission made by defendant's counsel.

W. J. Street, for the plaintiffs in error.

A. Dimmick and A. C. Niven, contra.

By Court, NELSON, J. In *Kellogg v. Wilder*, decided in July term, 1831 (not reported), the first question raised in this case was decided, and it was there held, that for a mere neglect to return an execution, a suit lay against a constable and his sureties. In *Warner v. Racey*, 20 Johns. 74, a justice's judgment rendered against a constable was reversed, because there was no evidence that money had come to his hands; but there the condition of the bond was for the payment of all sums of money which should come into Warner's hands for collection by way of execution, and not in the terms of the statute, to pay to each and every person such sum of money as the constable should become liable to pay for or on account of any execution, etc. In *Gardner v. Jones*, 20 Johns. 357, the liability of the constable for the mere neglect to return is fully recognized. Every person chosen or appointed to the office of constable is required, before entering on the duties of his office, to enter into an instrument in writing with one or more sureties, by which he and they shall jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the constable may become liable to pay on account of any execution which shall be delivered to him for collection: 1 Rev. Stat. 346, sec. 21, being a re-enactment of the act of 1813, 2 L. R. 126. It is clear that the responsibility of the sureties is co-extensive with that of the constable, and that they are liable whenever he is liable to a party in whose favor an execution has been delivered to him. It would be doing violence to the language and obvious intent of the act, and greatly abridge the rights of parties, to confine such responsibility to cases only in which moneys had been collected and remained in the hands of the officer. The provision in the revised statutes, 2 Rev. Stat. 253, sec. 159, in terms more express than the act of 1824, subjects the constable to an action of debt for neglecting to return an execution, and authorizes a recovery against him for the amount of the execution, with interest.

The following cases show the general understanding of the profession and of the court as to the liability of constables and their sureties: 13 Johns. 191; 14 Id. 225; 3 Wend. 282; 2 Id. 615. The provision in the revised statutes, 2 Rev. Stat. 254, sec. 163, giving the action of assumpsit against the constable and his sureties for moneys collected upon an execution, in no way affects the general responsibility of constables and their sureties under the act: 1 Rev. Stat. 346, sec. 21. Assumpsit in the particular case of moneys collected was probably given from

abundant caution, though I can not perceive its importance; at all events, I can not construe it as limiting the responsibility of the sureties to cases where moneys have been actually collected.

The justice decided correctly in overruling the demurrer, and as by it the delivery of the execution to the constable and the amount of it were admitted, it was competent to the justice to compute the interest, and render final judgment. Demurrers in justices' courts are usually put in and heard without much formality, being generally decided at the time. Generally, when the decision is against them, the justice should allow them to be withdrawn, and should give liberty to plead, if asked for; still it is a question in some manner resting in the discretion of the justice, and I am not prepared to say that discretion was abused in this case. The justice returns that the defendant admitted (independently of the demurrer) all the facts in the declaration; and on this ground, no doubt, he refused liberty to plead. Should the discretion thus reposed in a justice be abused, the common pleas ought to interfere; the error would be similar to an improper refusal to grant an adjournment, and to some other cases in which the justice is bound to exercise a sound discretion.

Judgment affirmed.

OFFICERS NOT RETURNING EXECUTION—HOW A RETURN MAY BE COMPELLED.—The following treatment of these questions, with a few additional citations, will be found in *Freeman on Executions*, §§ 367, 368:

In England, an officer failing to return an execution in due time can be compelled to do so by obtaining a special rule of court requiring the return to be made, and then by proceeding against him by attachment and amercement, in case of his non-compliance with the rule: *Impey on Sheriffs*, 89-91; *Rez v. Sheriff of Shropshire*, 9 Jur. 12; *Howitt v. Rickaby*, 9 Mee. & W. 52; 1 D. N. S., 389; *Rez v. Sheriff of London*, 1 Taunt. 489; *Rez v. Sheriff of Middlesex*, 1 H. Bl. 543; *Pardee v. Robertson*, 6 Hill, 550; *Morland v. Leigh*, 1 Stark. 388. The defendant may be interested in having a writ returned. Hence, he, as well as the plaintiff, may proceed against a negligent officer by rule and attachment: *Edmonds v. Watson*, 7 Taunt. 5; 2 Marsh. 330; *France v. Clarkson*, 2 Dow. P. C. 532; *Richardson v. Trundle*, 8 C. B. N. S. 447; 7 Jur. N. S. 28; 29 L. J. C. P. 310. For a case involving the right of a defendant to compel the return of a *ca. sa.*, see *Williams v. Webb*, 2 D. N. S. 904; 5 Scott, N. R. 901; 7 Jur. 155.

In the United States, proceedings against officers by rule and attachment have been resorted to with less frequency than in England. The more usual remedy here is to bring an action or motion against the sheriff, to recover damages from him for not returning the writ. But returns are, in this country, sometimes compelled by attachment: *Wilson v. Wright*, 9 How. Pr. 459; 4 Wait Pr. 25. An officer is amenable to attachment for not returning a writ which was never in his possession, but was received by his deputy.

Van Tassel v. Van Tassel, 31 Barb. 439; *People v. Brown*, 6 Cow. 41, overruling *People v. Waters*, 1 Johns. Cas. 137; unless the motion against him is made many years after the death of the deputy: *People v. Gilliland*, 7 Johns. 555. If a writ be sent to a foreign county, the court out of which it issued has the power to compel its return: *Shindler v. Blunt*, 1 Sandf. 683. And where a motion is made against a sheriff for failing to return an execution sent to him from another county, he is only entitled to notice where the writ was mailed to him, not where it was delivered personally: *Lane v. Keith*, 58 Tenn. 189; *Reese v. Creson*, 57 Id. 458. Courts will compel the return of executions, although by lapse of time the right of action against the officer for the damages resulting from the non-return has been barred: *People v. Everest*, 4 Hill, 71.

It is the duty of the officer to return every execution delivered to him for service. This duty was, as we have shown in the preceding section, enforced by attachment. The remedy by attachment was deemed so adequate, that in England no other seems to have been allowed to the plaintiff, and he was denied the right to sue for and recover damages for the non-return of his writ: *Pardee v. Robertson*, 6 Hill, 550; *Commonwealth v. McCoy*, 8 Watts, 153, and authorities there cited. Hence, in some of the United States, decisions have been made affirming that the plaintiff could sustain no action against the officer until he had exhausted his remedy by attachment, or had, at least, taken some steps tending to compel the making of the return: *Commonwealth v. Magee*, 8 Pa. St. 240. But this view is certainly not in accord with the great majority of the American decisions on the subject. The duty of the officer is to return the writ at a particular time, whether ruled to do so or not. The fact that the plaintiff had made some ineffectual attempt to compel the discharge of the officer's duty would tend to show intentional neglect, and make the conduct of the officer appear more inexcusable than if no such attempt had been made. But certainly the absence of the attempted coercion, on the part of the plaintiff, ought not to justify the omission of an unmistakable duty on the part of the officer. In the United States, many statutes have been enacted for the purpose of giving ample and, in most cases, summary and punitive redress against officers neglecting or refusing to return final process.

Independent of these statutory provisions, the right of a plaintiff to maintain an action against an officer and his sureties for a failure to make a return has been generally conceded: *Hawkins v. Commonwealth*, 1 Mon. 144; *White v. Wilcox*, 1 Conn. 347; *Burk v. Campbell*, 15 Johns. 456; *McGregor v. Brown*, 5 Pick. 170; *Keith v. Commonwealth*, 5 J. J. Marsh. 359; *Roland v. Bentley*, 4 Hen. & M. 461; *Runlett v. Bell*, 5 N. H. 433. The misconduct of the officer may have in fact occasioned no injury to the plaintiff, but the latter is nevertheless entitled to recover at least nominal damages where the officer does not show a valid excuse for not making his return: *Lafin v. Willard*, 16 Pick. 64; *Governor v. Baker*, 14 Ala. 652; *Kidder v. Baker*, 18 Vt. 454; *Goodnow v. Willard*, 5 Metc. 517. An officer may successfully defend an action against him for not returning an execution by showing that the non-return resulted from the act or instructions of the plaintiff: *Robertson v. Coker*, 11 Ala. 466; *Kennedy v. Smith*, 7 Yerg. 472; *Robinson v. Harrison*, 7 Humph. 189; *Granberry v. Crosby*, 7 Heisk. 579; *Shannon v. Clark*, 3 Dana, 152; *Norris v. State*, 22 Ark. 524; or was ratified or waived by him: *McKinley v. Tuttle*, 6 Lana. 214; or that the writ or the judgment on which it issued was void: *Shute v. McBae*, 9 Ala. 931; *Hill v. Wait*, 5 Vt. 124; *Graham v. Chandler*, 15 Ala. 342; *Bowen v. Jones*,

13 Ired. 25; though the sheriff can not take advantage of any mere irregularity in the judgment, rendering it voidable and not void: *Forsyth v. Campbell*, 15 Hun. 236. But it is no defense that the writ was irregular, where the irregularity is not such as to render it void: *McRae v. Colclough*, 2 Ala. 74; *Bondurant v. Woods*, 1 Id. 543. That the judgment was paid, has been held to be a sufficient excuse for not returning a writ: *Evans v. Boggs*, 2 W. & S. 229. That the execution was returned in a few days after the proper time is no defense: *Brookfield v. Remsen*, 1 Abb. Ct. App. 210; 4 Tr. App. 278; *Peck v. Hurlburt*, 46 Barb. 559; nor is the sheriff's liability affected by the fact that the writ came to his hands but a few days before the return day: *Chaffin v. Stuart*, 57 Tenn. 296.

The officer may have no perfect defense to the action, and yet various facts may be given in evidence for the purpose of mitigating the damages. It was at one time held in New York that the officer might, in mitigation of damages, show that the defendant was still solvent, and that the plaintiff might, by taking out a new writ, collect the full amount of his debt: *Stevens v. Rowe*, 3 Den. 327, overruled in *Ledyard v. Jones*, 7 N. Y. 550. If this defense is permissible, it may be pleaded to each of several consecutive writs, and the plaintiff thus kept out of his money for an interminable period. But the better opinion is, that an officer who fails to return an execution becomes, in the absence of statutory provisions to the contrary, at once, *Chaffin v. Crutcher*, 2 Sneed, 360, *prima facie*, liable to the plaintiff for the full amount collectible under the writ: *Roth v. Duvall*, 1 Idaho, 167; *People v. Roper*, 4 Scam. 560; *People v. Nichols*, Id. 560; and that he can diminish the amount of his liability, not by showing that the writ can still be executed, but only by proving that, from the insolvency of the defendant, or from some other sufficient cause, the writ could not be satisfied, and therefore that its non-return did not damage the plaintiff to the amount of the writ: *Bank of Rome v. Curtiss*, 1 Hill, 275; *Pardee v. Robertson*, 6 Id. 550; *Weld v. Bartlett*, 10 Mass. 470; *Ledyard v. Jones*, 7 N. Y. 550; *Swezey v. Lott*, 21 Id. 481; *Brookfield v. Remsen*, 1 Abb. Ct. App. 210; 4 Tr. App. 278; *Taylor v. Hancock*, 19 La. An. 466; *Bowman v. Cornell*, 39 Barb. 69; *People v. Lott*, 21 Barb. 130. For failure to return a *venditioni exponas*, the liability of the officer can not exceed the value of the property directed to be sold: *Johnson v. Gwathney*, 2 Bibb, 186.

In several of the states the amount of an officer's liability for not returning executions is fixed by statute; and the insolvency of the defendant does not mitigate the damages. In Alabama, the officer is liable, by way of penalty, for twenty per cent. of the amount of the writ: *Noble v. Whetstone*, 45 Ala. 361. In Arkansas and Missouri, he must pay the whole sum due to plaintiff: *Norris v. State*, 22 Ark. 524; *Milburn v. State*, 11 Mo. 188. The statutes of Kentucky, North Carolina, and Virginia, also impose a penalty on the officer: *Deposit Bank v. Glenn*, 1 Metc. (Ky.) 585; *Richardson v. Wicker*, 80 N. C. 172; *Grandstaff v. Ridgely*, 30 Gratt. 1. He may defend himself by showing a reasonable excuse, such as that the writ was accidentally mislaid or lost: *Waring v. Thomas*, 1 Litt. 254; *Shippen v. Curry*, 3 Metc. (Ky.) 184; *Mitcheson v. Foster*, Id. 324. Failing to return the writ for thirty days after the return day, or to show a sufficient excuse for not doing so, he becomes liable for the full amount of the execution, and thirty per cent. damages: *Keith v. Commonwealth*, 5 J. J. Marsh. 359; *Flourney v. Rubey*, 5 Id. 322. In Louisiana and New Jersey officers are liable for the full amount of the writ, unless they show a sufficient excuse for not returning it: *Magee v. Robins*, 2 La. An. 411; *Gasquet v. Robins*, Id. 407; *Webb v. Kemp*, Id. 370; *Lay v. Boyce*, 3 Id. 622; *James v. Thompson*, 12 Id. 174; *Ritter v. Merselles*, 4

Zab. 627; *Stryker v. Mersedes*, Id. 542. In Ohio, the officer, for failing to return the writ, may be amerced in the amount of the debt, damages, and costs, with ten per cent. added thereto; *Seney's Code C. P.*, sec. 451; *Graham v. Newton*, 12 Ohio, 210; *Moore v. McClief*, 16 Ohio St. 50. The party prosecuting the officer "must bring himself both within the letter and the spirit of the law;" and the courts seem to seek for excuses for relieving officers from the harsh provisions of the statute: *Moore v. McClief*, 16 Ohio St. 50; *Duncan v. Drakely*, 10 Ohio, 47; *Webb v. Anspach*, 3 Ohio St. 522; *Conkling v. Parker*, 10 Id. 28; *Langdon v. Summers*, Id. 77. In Tennessee, the insolvency of the defendant does not mitigate the damages which may be recovered for the failure to make due return of a writ: *Webb v. Armstrong*, 5 Humph. 379; *Fowler v. McDaniel*, 6 Heisk. 529. If, after receiving the writ, and before its return day, the officer's official term expires, and he has made no levy, he has in Tennessee no power to return the writ, and can not be proceeded against in a summary manner on account of its non-return: *Fowdrin v. Planters' Bank*, 7 Humph. 447; *Neil v. Beaumont*, 3 Head, 556; *State v. Parchmen*, Id. 609.

In most of these states, the proceedings for the enforcement of the officer's liability are of a summary character. No new or independent action need be commenced. A motion may be made in the suit in which the execution issued, and a judgment obtained therein against the officer and his sureties, for the penalty prescribed by statute: *Noble v. Whetstone*, 45 Ala. 361; *Chaffin v. Crutcher*, 2 Sneed, 360; *Wingfield v. Crosby*, 5 Coldw. 241; *Earl v. Smith*, 26 Tex. 522; *Bank of Louisville v. Hurt*, 8 Bush, 633; *Dana v. Newman*, 7 How. (Miss.) 582; *Benson v. Porter*, Meigs, 519; *Hand v. The State*, 5 Humph. 515; *Morehead v. Halliday*, 1 Smed. & M. 625; *Savage, ex parte*, 4 Baxter, 337. In this last citation, it was stated that the judgment against the sheriff and his sureties, to be valid, should set forth a state of facts as being shown in proof, authorizing the exercise of the jurisdiction. "It is not required that the proof should be set out in detail; it is enough if the court assumes, as having been made to appear, the state of facts necessary to justify their conclusion. The jurisdictional facts necessary to appear in a judgment against a sheriff and his sureties for the delinquency of his deputy in failing to return an execution, are the office of sheriff, the security-ship of defendant, the relation of deputy, and his failure to return the execution according to law: *Snell v. Rawlings*, 3 Humph. 89."

RUSSELL v. ROGERS.

[10 WENDELL, 473.]

A CREDITOR WHO SIGNS A COMPOSITION DEED, releasing the debtor from all demands, and sets opposite his name an amount representing his debt, can not sue the debtor on a demand accruing prior to the release, and entirely distinct from the debt set forth in the deed.

A CREDITOR WHO ASSUMES TO COMPOUND FOR HIS ENTIRE DEMAND, can not subsequently sue the debtor on a claim existing prior to the execution of the composition deed.

IDEM.—Whether the action could be maintained if the creditor was ignorant of the fraud by which the claim was created, *quære*.

COMPOSITION between debtor and creditor. Russell and Hall

sued Rogers for the breach of a covenant contained in the assignment of a bond and warranty to confess judgment against W. & L. Jenks, alleging that Rogers had received satisfaction of the judgment, and discharged the same. Other facts appear from the opinion of the court before whom it came on a demurrer to the replication.

S. Stevens, for the defendant.

H. P. Hunt, *contra*.

By Court, NELSON, J. The replication is no answer to the second, third, and fourth pleas of the defendant. The covenant declared on bears date the eighth of March, 1821, and the breach alleged is on the thirtieth of March, 1822, when the demand, or cause of action, if any, accrued to the plaintiffs. The pleas set up in bar of the action a release under seal, executed on the eleventh of April, 1827, and they expressly aver in addition, that it was after the breaches in the covenant assigned, and after the supposed causes of action mentioned and relied on in the declaration.

The plaintiff, in his replication, craves oyer of the release, and it is set forth, by which it appears that the defendant proposed to his creditors to assign to trustees, for their benefit, all his estate, real and personal, and they agreed to discharge him from any demand which they had against him. This was on the twentieth of March, 1827. On the eleventh of April the assignment was made, and on the same day the deed of release was executed by the creditors, among whom were the plaintiffs, by which, in terms, they "remised, released, exonerated, and forever discharged," etc., the defendant "from all, and all manner of action and actions, cause and causes of actions, suits, bills, bonds, writings, obligations, debts, dues, reckonings, accounts, damages, and demands whatsoever, both at law and in equity, or otherwise howsoever against him, which they or either of them then had, or shall or may have, by reason of any act, matter, or cause, from the beginning of the world to the date." The answer given to this deed of release, thus set forth, is, that the sum of nine hundred and twenty-two dollars and eighteen cents, the amount set opposite to the plaintiffs' names to the agreement to accept the proposition of the defendant, and to the deed of release, was a debt and demand wholly distinct and different from the cause of action set forth in the plaintiffs' declaration, and that the covenant there relied on was not included in the demand released. This presents the

question whether the deed of release, which in terms is general, and embraces every demand and all causes of action of every name and nature, is to be restrained, and deemed to operate only upon the debts set opposite to the names of the plaintiffs.

The question I think settled, upon principle and authority, against the plaintiffs. In *Holmes v. Viner*, 1 Esp. 131 (which was confirmed by the king's bench at the ensuing term), the plaintiff, at the time of the defendant's composition with his creditors, held two bills of exchange, of which the defendant was acceptor, and was also his creditor to the amount of eighty-one pounds, for goods sold. He signed only as a creditor for the eighty-one pounds, and took his dividend on that sum. Afterwards, when the two bills fell due, he brought an action to recover them of the defendant, as the acceptor. Lord Kenyon decided that it was not to be allowed a creditor having several demands against an insolvent person to split them, and come in under the composition deed for part, and subsequently sue for the remainder; that it would be fraud upon the other creditors, and defeat the object of the composition, which was intended by them to discharge the insolvent from his debts, as well as an oppression upon the debtor, who had given up all his property to constitute a fund for their benefit. He considered the bills as discharged by signing the composition deed. The doctrine of this case has been supported by all the subsequent cases: 15 Com. L. R. 502; *Britton et al. v. Hughes*, Id. 488;¹ *Knight v. Hunt*, 3 Id. 310.²

The case of *Britton v. Hughes* is like the present. At the time of executing the composition deed, which contained a release of all demands, nearly in the terms of that executed in this case, the plaintiff held two bills drawn by the defendant, one of four hundred pounds, the other of one hundred and fifty-six pounds and ten pence. The latter sum only was put opposite his name, and that, too, at the request of the defendant, under an expectation that the acceptor would pay the other bill, and therefore no composition notes were taken for it by the plaintiffs. The other creditors were ignorant of this arrangement, and the plaintiff was nonsuited on the trial on the authority of *Holmes v. Viner*, and the opinion sustained by the king's bench. The ground is, that upon the face of the composition deed, the creditor assumes to compound for the whole of his demand, and the other creditors, therefore, have a right to believe that the sum set opposite his name comprises that amount,

1. See 5 Bing. 460.

2. See 5 Bing. 422.

and to take this fact, with others, into consideration, in forming their judgment as to the propriety of entering into the arrangement, and to allow him subsequently to set up a debt concealed, and in contradiction to the face of the deed, would be a violation of good faith, and a fraud upon the other creditors.

We admit the soundness of the general rule of law in the construction of instruments relied on by the plaintiffs, to wit, that general words or expressions used, may be restrained and qualified by subsequent specifications or recitals; but no one can examine the composition deed in this case (and I consider the deed of the twentieth of March, and the two of the eleventh of April, 1827, as constituting but one instrument, being in *pari materia*, so far as the construction of them is concerned), and come to the conclusion that the sums set opposite the names of the respective creditors do not embrace, upon a fair interpretation, every demand which they hold against the debtor. The agreement of the creditors on the acceptance of his proposition to give up all his property is, to discharge him from any demand they had against him; and after the surrender of his property, they release him from all manner of actions, causes of action, debts, dues, damages, and demands, down to its date. So scrupulous are courts in compelling creditors to the observance of good faith towards one another, in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative: *Knight v. Hunt*, 4 East, 371; 2 T. R. 763; 15 Ves. 52; 4 T. R. 166; 3 Id. 551.

The discharge of the judgment entered upon the bond and warrant of attorney which was assigned to the plaintiffs by the defendant, on the eighth of March, 1821, and which constitutes the foundation of their claim in this case, is alleged to have been given on the thirtieth of March, 1822, and the order of this court, directing satisfaction to be entered by virtue of it, bears date the third of May, 1830. Now, if, in point of fact, the plaintiffs were ignorant of the discharge given by the defendant (the nominal plaintiff in the judgment) at the time of the composition deed, and relied wholly upon that security for the moneys due thereon, and therefore honestly believed that the nine hundred and twenty-two dollars and eighteen cents set opposite to their names was the only demand they held, or intended to hold, against the defendant at the time, and which

would have been the fact, had it not been for the fraudulent conduct of the defendant, thus concealed from them, I am not prepared to say this would not be an answer to the deed of release, set up in the several pleas in this case. I should be reluctant to sustain the defense, if the facts justified this view of the case; the fraud, in such case, would lie wholly with the defendant. The only difficulty that could exist, under such circumstances, in sustaining the action, would be with regard to the rights of the other creditors, within the cases above referred to, and I am not prepared to admit that difficulty to be insurmountable. But if the plaintiffs knew of the discharge of the judgment when they signed the composition deed, and, of course, of their claim upon the defendant for the breach of the covenant, there is no difference or distinction between this debt or demand and any other they might have against him. Though his conduct had been dishonest, still it was but a debt or demand, to be recovered or discharged as any other might be. This is the view warranted upon the pleadings, and upon which the case is determined.

Judgment for defendant on demurrer, with leave to plaintiffs to amend, on payment of costs.

PRIVATE AGREEMENT IN FRAUD OF OTHER CREDITORS to a composition deed is void: *Williams v. Schreiber*, 14 Hun, 40; *Kellogg v. Richards*, 14 Wend. 118; *Carroll v. Shields*, 5 E. D. Smith, 467.

CHANDLER v. DUANE.

[10 WENDELL, 503.]

TO ENTITLE THE PLAINTIFF TO COSTS in an action for overflowing his lands, it must be shown that the right to the direct use by entry on another's land came directly in controversy; the statute does not apply to cases of mere consequential injuries from the manner in which one uses his own land.

DEFENDANT IS ENTITLED TO COSTS where the plaintiff does not recover more than fifty dollars in an action for overflowing his land, although a parol license so to do came in question on the trial.

MOTION to tax costs to the defendants in an action on the case for overflowing the plaintiff's land, in which he obtained a verdict for fifty dollars. On the trial, a parol license thus to overflow the plaintiff's land was in question.

P. Gansevoort and B. F. Butler, for the defendants.

J. Williams, contra.

By Court, SUTHERLAND, J. The case of *Otis v. Hall*, 3 Johns. 450, is an express adjudication upon the precise point presented in this case. The action, and the ground of defense, and all the circumstances in that case, were precisely the same as in this; and it was there held that the setting up of a parol license from the plaintiff, to overflow his land by means of a mill-dam erected upon the defendant's own land, did not bring the freehold or title to the land in question, so as to entitle the plaintiff to costs under the statute, upon a recovery of less than fifty dollars. The court say there was no claim of a right of entry in the plaintiff's land, nor of any direct use or enjoyment of it. The defendant merely sets up a right to use his own land, in the manner he has done, by erecting the dam, and that any consequential injury to the plaintiff was waived by his express license for that purpose, and that it was a mere *damnum absque injuria*, for which the plaintiff has no right of action. The statute applies only to cases where a claim or question, as to the direct use by entry on another's land, comes in controversy; not to cases of mere consequential injury, resulting from the particular manner in which the defendant may use or occupy his own land.

Although the language of the revised statutes, 2 Rev. Stat. 614, sec. 3, sub. 3, is somewhat different from the old act, it is believed that the legislature intended to do no more than adopt the construction which had previously been put upon the old act. It had been decided in *Heaton v. Ferris*, 1 Johns. 146, that a claim to the right of way, either by grant or prescription, brought the title to land in question; and in *Eustace v. Tuthill*, 2 Johns. 185, and *Tuncliff v. Lawyer*, 3 Cow. 382, that a claim of right by prescription to overflow the plaintiff's land, or by an uninterrupted enjoyment of it for twenty years, also brought the title to land in question, within the meaning of the statute. It was the principle of these decisions, I apprehend, which the legislature intended to adopt in the revised statutes. I am persuaded they had no intention to make so important an alteration in the law as is contended for by the plaintiff in this case. This opinion is strengthened by the notes of the revisors, in which the above decisions are referred to, as the foundation of the change of phraseology which they recommend.

The motion of the defendants, for costs, must therefore be granted.

Followed in *Wickham v. Seely*, 18 Wend. 650; *People v. N. Y. C. P.*, Id. 580; *Burnet v. Kelly*, 10 How. 410; *Dolittle v. Eddy*, 7 Barb. 79; *Rathbone v. McConnell*, 20 Id. 319; S. C., 21 N. Y. 470.

SMITH v. CUTLER.

[10 WENDELL, 589.]

COURT HAS POWER TO VACATE AN AWARD for corruption, fraud, misconduct, or misbehavior, or to modify it for miscalculation, imperfections in form, or where it is beyond the submission.

THE REVISED STATUTES HAVE NOT ALTERED THE LAW in respect to the power of the court to set aside an award for misconduct of the arbitrators.

MISCONDUCT AND MISBEHAVIOR do not refer to errors of judgment, but imply an intention to do wrong.

UNLESS IN CASE OF A MISCALCULATION, the court can not modify an award affecting its merits.

MOTION TO VACATE OR MODIFY AN AWARD should be made at some special term after the publication of the award, and before the next regular term; but if made at such term, it is in time to save the party's right.

WHEN THE STATUTE SPEAKS OF TERMS, the terms constituted by law are meant, and not special motion days, known as special terms.

MOTION to vacate or modify an award of arbitrators made in August, 1833. Smith gave notice of motion to be made at the general October term. Cutler obtained his costs, the court refusing to hear the motion, it being non-enumerated business. Smith now renewed his motion, but Cutler objected that the application was too late, that it should have been made at a special August term. The objection was met by the excuse that the party misapprehending the practice, had noticed the case for the October term. The objection was overruled; and the party urged that the award was not warranted by the evidence.

S. Cheever, in support of the motion.

I. L. Wendell, *contra*.

By Court, SAVAGE, C. J. The court have power to vacate an award: 1. If procured by corruption, fraud, or other undue means. 2. If there was corruption in the arbitrators or either of them. 3. If the arbitrators were guilty of misconduct in refusing to postpone the hearing for good cause, or in refusing proper evidence, or other misbehavior affecting the right of either party. 4. If the arbitrators exceeded their powers, or the award is not final, and the court have power to modify the award. 1. Where there is an evident miscalculation of figures, etc. 2. Where the arbitrators have awarded out of the submission, etc. 3. Where the award is imperfect in form, not affecting the merits. Before the revised statutes, it was well settled that an award could not be set aside in this court, unless

for corruption or misconduct in the arbitrators. The revised statutes do not seem to have altered the law in that respect. The court may now vacate the award, if procured by corruption of the party or any other person, or if there was partiality, corruption, or misconduct in the arbitrators, thus far clearly excluding an error of judgment in the arbitrators. The terms misconduct and misbehavior, as used here, are not applicable to a mere error in judgment, but imply an intention to do wrong. In the fourth subdivision of section 10, the power to vacate is given, where the arbitrators have exceeded their powers, or imperfectly executed them, whether honestly or dishonestly. The legislature seem cautiously to guard against any intermeddling with an award upon the merits. Where the court have power to modify, it is only with an intent to perfect what was imperfectly attempted to be done by the arbitrators. Unless in the case of a miscalculation of figures, the court can make no modification affecting the merits. It could never have been the intention of the legislature that this court should sit in review upon the decisions of all the arbitrators in the state; if such had been their intention, they would have provided some writ of review or writ of error. It was intended to give relief in cases of corruption or improper conduct on the part of the arbitrators or parties, or where there was a want of jurisdiction, or the award was not final; but in no other case. The object of this application is to review the acts of the arbitrators upon the merits. There is no pretense of any misconduct, except the errors in judgment of the arbitrators, and therefore we have no right to interfere with them.

A question was raised, whether this motion was made in time. The statute says the application shall be made at the next term after the publication of the award. This application was so made, and though, by the present practice of the court, it could not then be discussed, the party was in season, and should not lose his rights. The motion should properly be made at some special term after the publication of the award, and before the next regular term; but if made at such term, it is in time to save the party's rights. When the statute speaks of terms, the terms constituted by law are meant, and not special motion days, to which have been given the designation of special terms.

Motion denied without costs.

FOR WHAT CAUSES COURTS WILL SET ASIDE AWARD. — See *Merritt v. Thompson*, 27 N. Y. 233; *Emmet v. Hoyt*, 17 Wend. 416; *Turnbull v. Martin*, 37 How. 21; *Ketcham v. Woodruff*, 26 Barb. 149.

VAN RENSSELAER v. RADCLIFF.

[10 WENDELL, 639.]

COMMON, OR A RIGHT OF COMMON, is a right or privilege which several persons have to the produce of the lands or waters of another.

COMMON APPENDANT is a right annexed to the possession of arable land, by which the owner is entitled to feed his beasts on the lands of another, usually of the owner of the manor of which the lands entitled to common are a part, and can be claimed by prescription only.

COMMON APPURTENANT does not necessarily arise from any connection of tenure, but must be claimed by grant or prescription; it may be created by grant, and may be annexed to any kind of land, whether arable or not.

COMMON IN GROSS has no relation to the tenure of lands, but is annexed by deed or prescription to a man's person.

COMMON OF ESTOVERS is the right a tenant has to take necessary wood and timber from the woods of the lord for fencing, fuel, etc., and may be either appendant or appurtenant.

COMMON OF ESTOVERS ARE NOT APPORTIONABLE.—The common belongs to the entire tract as an entirety, and if the owner of such tract conveys to different persons, the common is extinguished, and can not be revived but by a new grant.

WHERE A COMMON OF ESTOVERS DESCENDS UPON SEVERAL, although they can not enjoy it severally, they may convey to one who might enjoy it in severalty as an entirety.

THE LORD OF THE MANOR MAY IMPROVE HIS WASTE LAND, provided he leaves enough for those entitled to common.

TO BAR A COMMON, the improvements by the lord must be actual *bona fide* improvements; a mere possession fence is not sufficient. A stranger, however, can not question the sufficiency of the improvement.

WHERE A COMMON IS NOT APPORTIONABLE, a purchase by the commoner of a part of the land subject to the common extinguishes it.

TITLE TO LAND NOT IN ANOTHER'S POSSESSION, is sufficient to maintain trespass against a stranger.

ERROR from the common pleas. Trespass brought by Stephen Van Rensselaer, jun., against Radcliff for entering a certain close and cutting and carrying away timber. Plea, the general issue, with notice of special matter. The plaintiff proved the leasing to himself by the elder Van Rensselaer, of the premises in question, and "all the unappropriated lands" in certain towns, in November, 1819, not theretofore granted or conveyed to others, and proved the cutting of three hundred or four hundred rails in the *locus in quo* by the defendant in February or March, 1830. The defendant then produced in evidence a lease in fee from the elder Van Rensselaer, "lord and proprietor of the manor of Rensselaerwyck," to Jacob Truax, on the fourth of September, 1769, of a certain farm situate in the same town with

the *locus in quo*, and in the said manor, "containing one hundred and eighty-one acres, together with free liberty for out-drift of cattle, and cutting and carrying away of timber for building, fencing, and fuel in the unappropriated lands of the said manor, for the use of the said hereby released lands only," reserving certain mill privileges and the right to appropriate lands for certain specified purposes. In December, 1769, Jacob conveyed the farm granted to him, by two distinct deeds, to his sons Andrew and John, each deed containing the words, "together with the rights, members, and appurtenances thereof, and all houses, edifices, profits, advantages, emoluments, and hereditaments to the same belonging or appertaining." In June, 1815, Andrew conveyed his portion to John Tayler. John Truax died testate, leaving his portion to his wife, who conveyed to Tayler in 1818. Tayler devised the farm to Cooper, under whom the defendant cut the rails which were used in making and repairing the fences on the farm, and were necessary for that purpose. It also appeared that the *locus in quo* was inclosed by a mere possession fence, and that the elder Van Rensselaer leased part of the manor unappropriated, to John Truax in 1791, which subsequently passed to Tayler, who was entered on the landlord's books as tenant of the same.

The defendant insisting that he was entitled to a verdict, the plaintiff objected on the grounds that: 1. Neither of the conveyances to the sons of Jacob Truax, nor the subsequent conveyances under which Tayler held, contained an express grant of the right of common. 2. The right of common, granted by the original lease, was for the farm thereby conveyed as an entirety only, and that such right was not susceptible of being assigned to different lessees at the same time. 3. By the terms of the grant of the right of common to Jacob Truax, the right to make future appropriations was reserved to the lord of the manor, and the lease to the plaintiff was an appropriation within the meaning of the grant. 4. Tayler having become owner of the farm leased to John Truax in 1791, which was part of the manor unappropriated in 1769, the whole right of common as to him and those claiming under him was extinguished. 5. There being no covenants in the lease of 1769, neither the grantor nor his heirs nor assigns were bound to retain a sufficiency of common. The objections were overruled, and a verdict directed for the defendant. Verdict accordingly, and judgment.

J. T. B. Van Vechten, for the plaintiff. The right of common of estovers was appurtenant, not apportionable, and therefore extinguished by the conveyance in separate parcels to the sons of Jacob Truax: 2 Inst. 85, a; 4 Co. 37; Co. Lit. 121, 122; *Musgrove v. Cave*, Willes, 322; *Wild's case*, 8 Co. 78; Co. Lit. 164, c; Cru. Dig., tit. 23, sec. 37; Finch Law, book 2, c. 9, p. 158; Co. Lit. 147, 148, a; 2 Fitzh. N. B. 180, h; *Luttrell's case*, 4 Co. 86. The severance of an entirety, such as an entirety of common of estovers, by act of the parties, and sometimes by operation of law, works an extinguishment: *Knight v. Buck*, 1 And. 175, in 11 Vin., tit. Extinguishment, pl. 4; *Bruerton's case*, 6 Co. 1; *Wiseman v. Wallinger*, Godb. 95, pl. 107. In support of the third of the above positions, counsel cited 3 Kent Com. 323-326; *Glover v. Lane*, 3 T. R. 445; *Arlett v. Ellis*, 7 Barn. & Cress. 364.

R. J. Hilton, *contra*, to show that a common of estovers was apportionable, cited *Livingston v. Ten Broeck*, 16 Johns. 15 [8 Am. Dec. 287]; Co. Lit. 122, b; Cro. Car. 582; 8 Co. 156; Hob. 235; 5 Vin. 17, pl. 19; 2 Bl. Com. 33.

By Court, SAVAGE, C. J. Common or a right of common, is a right or privilege which several persons have to the produce of the lands or waters of another. Thus, common of pasture is a right of feeding the beasts of one person on the lands of another; common of estovers is the right a tenant has of taking necessary wood and timber from the woods of the lord, for fuel, fencing, etc.; common of turbary and piscary are, in like manner, rights which tenants have to cut turf or take fish in the grounds or waters of the lord. All these rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil. They are in general either appendant or appurtenant to houses and lands. There is much learning in the books relative to the creation, apportionment, suspension, and extinguishment of these rights, which, fortunately in this country, we have but little occasion to explain; but few manors exist among us as remnants of aristocracy not yet entirely eradicated. These common rights which were at one time thought to be essential to the prosperity of agriculture, subsequent experience, even in England, has shown to be prejudicial. In this country such rights are uncongenial with the genius of our government, and with the spirit of independence which animates our cultivators of the soil. In our state, however, we have the manors of Liv-

ington and of Rensselaerwyck, in which these rights have existed, and to some extent do still exist, and we are obliged, therefore, to look into the doctrine of commons to ascertain the rights of parties, and do justice between them.

Common of pasture is the principal of these rights, and therefore most of the cases found in the books relate to that species of common. This was appendant, appurtenant, in gross, or because of vicinage; of the last I shall take no notice, because it is not applicable to estovers. Common appendant is a right annexed to the possession of arable land, by which the owner is entitled to feed his beasts on the lands of another, usually of the owner of the manor of which the lands entitled to common are a part. This kind of common must have existed from time immemorial, and can be claimed by prescription only, and is confined to such, and so many cattle as are necessary to plow and manure the land which is entitled to common, and which are *levant* and *couchant*, that is, so many as the land will sustain during the winter. Common appurtenant does not necessarily arise from any connection of tenure, but must be claimed by grant or prescription. It may be created by grant, and may be annexed to any kind of land, whether arable or not. Common in gross has no relation to the tenure of land, but is annexed by deed or prescription to a man's person.

Common of estovers must, I apprehend, be either appendant or appurtenant; they are necessarily incident either to houses or lands. This right of common may exist by prescription, and is then appendant, or be especially granted, and then it becomes appurtenant: 3 Cru. Dig. 83-90; 3 Bl. Com. 33, 34. Whether this kind of common is apportionable is the principal question in this case. It seems to have been doubted heretofore whether common of pasture was apportionable, and we find the subject elucidated by Chief Justice Willes, in *Bennett v. Reave*, Willes, 227, as late as the year 1740. He says, common of pasture appendant may be apportioned; for as the land is entitled to common only for such cattle as are necessary to plow or manure the land, the common can not be surcharged by any number of divisions or subdivisions in consequence of alienation. It had been contended in that case that the owner of every parcel, even a yard, was entitled to common for beasts of the plow as well as other cattle, on the assumed ground that the tenant was bound to plow the lord's land, and therefore must have a team, and of course must have them pastured; but it was clearly shown that the team entitled to pasture was

such as was necessary for plowing the land entitled to common, and it made no difference into how many hands it went; no more team was necessary for plowing, and no more cattle necessary for manuring. Such common is apportionable, and the common being incident to the land, passed with it in such proportions as the land should be divided into; the assignee of half, for instance, of the land, was entitled to half the right of common. This case was of common appendant, and of this kind of common, of pasture, it is said, it is apportionable either when part is purchased by the lord, or any other person. Common appurtenant of pasture is also apportionable by alienation of part of the land, but not if the person entitled to it purchases part of the land out of which the common is to be had: 3 Cru. 92, 93; Co. Lit. 122, a; and the reason assigned is, because common appurtenant is against common right, whereas common appendant is of common right: 4 Co. 86; 8 Id. 78.

The authorities also inform us that common of estovers can not be apportioned. Lord Coke says: "If a man have reasonable estovers, as housebote, etc., appendant to his freehold, they are so entire that they shall not be divided between coparceners:" Co. Lit. 164, b; 3 Cru. 93. Lord Mountjoy's case is there stated, which was that of common of turbary, and it was resolved that he could not assign his interest to one or more, for that might work a prejudice and surcharge to the tenant of the land, and therefore, if such an inheritance descended to parceners, it can not be divided. In *Luttrell's case*, 4 Co. 87, Lord Coke says: "So, if a man has estovers by grant or prescription to his house, although he alters the rooms and chambers of this house, as to make a parlor where it was the hall, or the hall where the parlor was, and the like alterations of the qualities, and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed; and although he builds a new chimney or makes a new addition to his old house, by that he shall not lose his prescription; but he can not employ or spend any of his estovers in the new chimneys, or in the part newly added:" 3 Cru. 89. Estovers appurtenant to a house can not be separated from the house, but must be spent on the house: 3 Id. 89; Plowd. 382. These authorities seem to be express that common of estovers can not be apportioned, and for the reason that thereby the land out of which the estovers are to be taken would be surcharged. If, for instance, estovers

are granted as belonging to a farm of two hundred acres, so long as this is one farm, there is but one house, and probably not more than two chimneys; but, if this farm is divided into two, another house becomes necessary, and double the number of chimneys must be supplied. This would be an injury to the lord. So, also, of fences and buildings; by dividing the farm into two, more fences and buildings become necessary, and if both are to be supplied from the woods of the lord, an increased quantity would be taken, where, by the grant itself, only estovers for one farm were allowed. As these estovers can not be apportioned, neither of the tenants among whom the farm is divided can have them, and therefore they become extinguished. Common of estovers must be considered as an entire thing, not to be divided; and in case of a common person, if an entire thing be divided or extinguished in part by the act of the party, it is an extinguishment of the whole; but otherwise where it is by the act of God or the law: 11 Vin. 567, pl. 4, tit. Extinguishment, P; *Bruerton's case*, 6 Co. 1; *Turringham's case*, 4 Id. 37.

Lord Coke also says: "If a man have reasonable estovers, as housebote, heybote, etc., appendant to his freehold, they are so entire as they shall not be divided between coparceners." Co. Lit. 164, b. In answer to the question, What shall become of such inheritances? he says it appears by the books that the eldest shall have them, and the others a contribution; but if no other property descended from which contribution could be had, then the parceners should have alternate enjoyment, or, in case of piscary, one shall have the first fish and another the second; and so of a toll-dish, where the hereditament was the toll of a mill. If, however, that doctrine were applicable here, it would only relate to descents, not alienation by deed, and even as to descents, it has been held that one of several heirs, to whom a right of estovers descended, could not alien his share so as to authorize the assignee to enter and cut wood: *Leyman v. Abeel*, 16 Johns. 30. This case of *Leyman v. Abeel* recognizes the doctrine which I have advanced, that estovers are not apportionable. There one of the proprietors of the Catskill patent devised certain lands to his two sons, and gave each an undivided moiety of his right in the undivided lands; he also devised portions of lands to each of his three daughters and to a granddaughter. He then gave to each of his children liberty of cutting wood and taking stone from any of his undivided lands in common forever. The land subject to common became the

property of the plaintiff. One of the five children of the proprietor, Nelly Abeel, died in 1809, leaving four children, one of whom conveyed his right to cut wood and carry away stone to the defendant, who did cut and carry away five loads of wood, for which the suit was brought. It was held that the right of Nelly Abeel descended to all her children, but that the right to cut wood, although descendible and alienable, could not be enlarged so as to defeat the intention of the devisor, by imparting the entire right to be enjoyed by each; that one could not alone convey any right; of course one alone had no right to cut wood; but from this case it would follow, that as the right was an entirety and had devolved by operation of law upon four, although they could not enjoy it severally, they might jointly convey it to one who might enjoy it in severalty as an entirety. It follows also from the doctrine of this case that the owner of such a right can not divide it, *i. e.*, by the act of the party; if he conveys part of the lands entitled to common, granting the right, it can not be enjoyed. The common belongs to the whole farm as an entirety, not to parts of it. This would enlarge the right to the prejudice of the land out of which the common was to be taken. As no one portion of the land entitled to the common could enjoy it, it is necessarily extinguished; and being extinguished, it can not be revived, only by a new grant. It is contended, by the counsel for the defendant in error, that the case of *Livingston v. Ten Broeck*, 16 Johns. 14 [8 Am. Dec. 287], contains a contrary doctrine. It was conceded that the question of extinguishment did not arise in that case, but the learned judge who gave the opinion of the court does say that common appurtenant can be apportioned, and he refers to several cases as sustaining the position, all of which cases are cases of common of pasture.

It will be seen, by applying these principles to this case, that Jacob Truax was entitled to common; but when he conveyed his farm, on the fifteenth of December, 1769, part to one son and part to another, thereby creating two farms out of the one entitled to common, such right being an entirety, not being apportionable, could not be enjoyed by either, and of course was extinguished. This is the main point in the case, and is decisive of it.

Several other questions were raised and discussed, such as whether the lord had a right to inclose any part of the common, and if so, whether the lease in the present case was such an improvement as would exempt the *locus in quo* from being subject

to the right of common; and whether the plaintiff had such a possession as would entitle him to maintain trespass; which questions I will notice, but not discuss at large. 1. The possession of the plaintiff was sufficient against a stranger; he showed title to lands which were not in the actual possession of any other; he was therefore in possession, as in such cases the possession follows the title. 2. There is no doubt that the lord has a right to improve his waste lands, provided he leaves enough for those who are entitled to common. There can be as little doubt, I think, that the improvement to bar a common must be an actual *bona fide* improvement, not a mere possession fence run round a piece of woods. But as I hold the right of estovers in this case was gone, the defendant, and those whose estate he represents, have no right to raise that question, they are mere strangers, and as against such, the plaintiff's title and possession were sufficient.

The law is established in England, and recognized in the case of *Livingston v. Ten Broeck*, that if the commoner purchases part of the land subject to common, if the right of common be apportionable, it shall be apportioned, otherwise the whole is extinguished; but that principle seems to be not applicable here. The John Truax farm was purchased by John Tayler in 1791, long before he had any interest in the Jacob Truax farm, which was entitled to common. The ground of that extinguishment is this, that the commoner has voluntarily consented to the diminution of the common out of which his pasture or estovers were to be enjoyed; and where there can be no apportionment, there must be an extinguishment.

Upon the whole case, therefore, I am of opinion: 1. That the plaintiff, as against the defendant, has shown a sufficient possession of the *locus in quo*; 2. That common of estovers is not apportionable, and of course that though Jacob Truax was entitled to estovers, yet his heirs, to whom his farm was conveyed in parcels, and their assigns, never had any such right; and 3. That consequently the defendant was a trespasser in cutting the rails in question, and the plaintiff should have recovered in the court below.

Judgment of the common pleas reversed, with single costs, and a *venire de novo* to issue.

POSSESSION OF LAND SUFFICIENT TO MAINTAIN TRESPASS.—Followed in this respect in *Leland v. Tousey*, 6 Hill, 331; *Ehle v. Quackenboss*, Id. 539. See also *Root v. Chandler*, ante, 546, and note, and *Allen v. Crary*, ante, 566.

COMMONS.—See appearing in this series upon this subject, *Livingston v. Ten Broeck*, 8 Am. Dec. 287 and note, and *Holladay v. Marsh*, 20 Id. 678.

KIMBALL v. HUNTINGTON.

[10 WENDELL, 675.]

UPON A PLEA PUIS DARREIN CONTINUANCE, all previous pleas are, by operation of law, stricken from the record, and everything is confessed except the matter contested by the plea.

A DUE BILL in the words "Due K. and K. three hundred and twenty-five dollars, payable on demand. October 20, 1821," and signed, is a promissory note. An acknowledgment of indebtedness implies a promise to pay.

DECLARATIONS OF A PARTY TO SETTLEMENT MADE AT ITS CONCLUSION, and before rights of third persons attach, are admissible against the maker of a note, to show the transfer thereof between the parties to the settlement, the plaintiffs.

ACTS AND DECLARATIONS OF AN ASSIGNOR of a chose in action, made subsequent to the assignment, are not binding upon the assignee.

ASSUMPSIT on a promissory note for three hundred and twenty-five dollars, the declaration containing the money counts. Plea, *non assumpsit* and the statute of limitations. Reply, new promise. Subsequently, a plea *puis darrein continuance* was filed, setting forth a release from one of the plaintiffs, Kiniston. Reply that prior to this release, Kiniston had, for one hundred and sixty dollars, assigned all his interest in the due bill to Kimball, and that the defendant had notice thereof. Rejoinder that Kiniston did not assign to Kimball, and that the defendant did not have notice thereof, concluding to the country. Plaintiffs offered in evidence a due bill in these words: "Due Kimball and Kiniston, three hundred and twenty-five dollars, payable on demand. October 20, 1821;" and signed by the defendant. It was admitted against the defendant's objections. To show the assignment of Kiniston's interest in the due bill to Kimball, evidence of a settlement was introduced, by which it appeared that all the property relating to their joint operation should pass to Kimball; and he paid one hundred dollars to Kiniston on a debt due, and gave a note for fifty dollars. Evidence was also given to show that the defendant knew of the assignment of Kiniston's interest in the due bill, and obtained the release in order to defeat this action. Certain declarations sufficiently appearing from the opinion, and letters written by Kiniston after the assignment, were offered in evidence. Verdict for the plaintiffs, for five hundred and twenty-seven dollars and twenty-two cents. Motion for a new trial.

S. Stevens, for the defendant.

M. T. Reynolds, *contra*.

By Court, NELSON, J. The plea *pais darrein continuance* waived all previous pleas, and on the record the cause of action was admitted to the same extent as if no other defense had been urged than that contained in this plea. By operation of law, the previous pleas are stricken from the record, and everything is confessed except the matter contested by the plea *pais*: 6 Bac. Abr. 479; Cro. Eliz. 49; 1 Ld. Raym. 693; Bull. N. P. 309; 1 Salk. 178; 2 Wend. 300.

The only questions to be litigated upon the record were: 1. Whether Kiniston has assigned his interest in the note to his co-plaintiff, Kimball; and, 2. Whether the defendant had notice of such assignment before the execution of the release. If proper attention had been bestowed upon the pleadings, only one of these questions could have been raised, as a denial of either fact was a sufficient answer to the replication. The court may, on special application, allow a defendant to rejoin several matters, if necessary for the "attainment of justice:" 2 Rev. Stat. 356, sec. 27; but it does not appear that any such application was made in this case.

The defendant, in a brief submitted, assumes that the cause of action is not confessed, and objects to the admissibility of the due bill in evidence, under either count in the declaration, and the ground upon which he places this objection is, that it is not a note, within the statute. Even if his assumption was right, the argument he derives from it could not be sustained. The instrument is a promissory note, within the statute, as it contains every quality essential to such paper. The acknowledgment of indebtedness on its face implies a promise to pay to the plaintiffs, and the payment by its terms is to be in money absolutely, upon demand: Chit. on Bills, 41, 324, 334; 1 Johns. 143. Neither the acknowledgment of value received nor negotiable words are essential to bring this paper within the statute: 9 Johns. 217; 3 Cai. 136. It is unimportant, however, to pursue this objection, as it could not be properly raised on the trial.

It is objected that there is no evidence in the case to show that the one hundred and sixty dollars, or any other sum, was paid by Kimball to Kiniston, in consideration of the assignment. The proof relied on is, that Kimball took the note on a settlement of accounts with Kiniston, and allowed him therein for his share or moiety. If the evidence on this point was competent, it was fairly submitted to the jury, and their verdict must be conclusive.

It is said, admitting that half the note was accounted for, it still would not appear that the one hundred and sixty dollars was paid, as alleged in the replication. The half of the note was one hundred and sixty-two dollars and fifty cents, which, of course, includes the one hundred and sixty dollars alleged to have been paid. Proving more than the amount certainly can not be objected to, or prejudice the plaintiff. If the assignment had been in writing, then there might have been a variance between the instrument proved and the one described; but no such objection could be taken here, as the whole rested in parol.

It is said, the evidence of Eunice Hutchinson, in relation to the settlement, was improperly admitted. She proved that about six years before the trial, her father and Kiniston were together with their books to make a settlement of their accounts; that she was a part of the time in the room, and the settlement was amicably made. After it was completed, they came into the room where she was, and said they had settled all their accounts, and that Mr. Kimball was to have all the property connected with their business in New York. The testimony of James Hutchinson corroborates most of the above facts, and proves, in addition, an entry under date of December, 1822, in the account book of Kimball, by which he charged himself with the amount of the note. The declarations of the plaintiffs, in relation to the terms of settlement, were made at the conclusion of it, and not afterwards, as contended by the defendant, and under the circumstances were entirely competent; they had just completed the settlement, and these declarations were part of the *res gestæ*, as much so in judgment of law as those made during the progress of the settlement. Besides, if we were to admit that the declarations of K. and K were subsequent to the settlement, we can see no well-founded objection to them, for the purpose offered. The object of the testimony is to prove a transfer of the note from one to the other, which would be binding between themselves or upon Kiniston, and the declarations of the latter would be good evidence against him for that purpose. I admit that these declarations would not be competent if made after third persons became interested, as in the case of the defendant after the release to him; but if no such objection exists, the admission of the parties, in relation to the transfer, is competent, whether made at one time or another, after or during the settlement. The testimony being admissible and pertinent, and fairly sub-

mitted to the jury, it seems to me we can not disturb the verdict, as we are unable to say it is not warranted by the facts.

The notice of the transfer is abundantly proved. E. H. Kimball swears that he called on the defendant, in behalf of his father, for payment of the note, and was answered that it could not then be made, and was requested to ask his father to take the note to himself individually, and it would be soon paid; that in the fall of 1825, he informed the defendant that his father had settled with Kiniston, and taken the note to himself, and again in 1827; and that since 1825, the defendant had frequently promised to pay the note. If this testimony is to be believed, the assignment of the note to Kimball was in pursuance of a request from the defendant, and of which assignment he was duly advised.

The refusal of the agent who procured the release, to relate the circumstances under which it was obtained, particularly in reference to that part of the transaction which tested the merits of it, was calculated to excite in the minds of the jury, and no doubt did, a suspicion unfavorable to the release, and gave color and strength to the view taken of it by the plaintiffs.

The letters of Kiniston to the defendant were clearly inadmissible. They were written after the assignment and notice; if no assignment was proved, then, without the letters, the defendant was entitled to the verdict, and if it was proved, they were incompetent to affect it. The only assignment relied on, or which the proof supported, or which was pretended, took place years before the date of these letters, and the subsequent declarations or confessions of the assignor were inadmissible to impair the rights of the assignee. The whole case turns upon the plea *puis darrein* and the issues growing out of it, which were questions of fact, and have been determined by the verdict. We are of opinion there is no error of the judge in the numerous points of law raised during the progress of the trial.

New trial denied.

PLEA PUIS DARREIN CONTINUANCE IS A WAIVER OF THE FORMER PLEA.—*Culver v. Barney*, 14 Wend. 162.

FOLLOWED AS TO WHAT WRITING IS SUFFICIENT AS A PROMISSORY NOTE in *Underhill v. Phillips*, 10 Hun, 592; *Sackett v. Spencer*, 29 Barb. 184; *Woodward v. Genet*, 37 Id. 527; *Luqueer v. Prosser*, 1 Hill, 259; *Elder v. Rouse*, 15 Wend. 220.

REQUISITES OF A PROMISSORY NOTE.—*Cook v. Satterlee*, 16 Am. Dec. 432, and note.

DECLARATIONS OF PARTIES TO A SETTLEMENT, made as a part of the settlement, are admissible in evidence: *Osborn v. Robbins*, 37 Barb. 483.

PEOPLE v. GENUNG.

[11 WENDELL, 18.]

EVIDENCE OF AN OFFER BY THE PROSECUTOR TO LEAVE COURT without testifying in a criminal cause, if the prisoner would settle, is inadmissible to contradict or impeach his testimony.

PRISONER'S BOOKS, WITHOUT OTHER TESTIMONY, ARE INADMISSIBLE in his behalf to show the state of the account of one whose signature he is charged to have obtained, by false pretenses, to a note for more than was due.

JUDGE'S OBSERVATION IN HIS CHARGE, THAT A WITNESS' TESTIMONY DIFFERS materially from a statement which he is said to have made out of court, such being the fact, is not error.

INDICTMENT FOR OBTAINING, BY FALSE PRETENSES, A SIGNATURE to a note, need not allege that any one suffered actual loss or prejudice thereby.

INDICTMENT for obtaining the signature of one Conly to a note for forty dollars by false pretenses, charging that the defendant procured Conly to sign the note by falsely pretending that it was a note for only four dollars, he being an illiterate person, "with intent to cheat and defraud him," etc. The defendant having been convicted at the general sessions of Yates county, tendered a bill of exceptions to the rulings of the court excluding certain evidence, the substance of which is stated in the opinion, and also to an observation by the court in charging the jury, to the effect that a statement alleged to have been made by Cronk, one of the defendant's witnesses, to one of the witnesses for the prosecution, before the trial, was materially different from the said Cronk's testimony with respect to his having read the note to Conly in an "ordinary audible voice." The bill of exceptions was signed, a certificate of probable cause given, and the indictment was removed into this court by a certiorari sued out by the district attorney.

I. L. Wendell, for the defendant, contended: 1. That the evidence excluded should have been admitted. 2. That the comments of the court on the testimony were error. 3. That the indictment was bad in not showing actual loss or prejudice to any one: 2 East Cr. L. 860; *Ward's case*, 2 Stra. 747. He also cited 2 East Cr. L. 823.

S. Stevens, for the people.

By Court, *SUTHERLAND, J.* Conly was the principal witness for the prosecution, and the counsel for the defendant, upon his cross-examination, offered to prove by him that he had frequently during the present session of the court offered to

the prisoner that if he would settle the subject-matter of the indictment, he, the witness, would leave the court, and not appear against him. This testimony was objected to by the counsel for the people, and was excluded by the court. I think it was properly excluded. It could legitimately have had no influence with the jury; it did not tend in the slightest degree to impeach the testimony of the witness, or to show that his narration was not true. Admitting that he had improperly endeavored to compromise the prosecution, his positive testimony in relation to the fraudulent conduct of the prisoner was not thereby impeached.

The books of account of the prisoner were also properly excluded. It would undoubtedly have been competent for him to have established, by proper evidence, that the balance actually due from Conly to him was forty dollars instead of four dollars; but his own books were not, of themselves, without other testimony, competent evidence of that fact; and in the offer of the books there was no intimation of any intention to give the additional evidence, without which they were clearly inadmissible.

There was no error in the charge of the court. The observation of the judge that the statement of Cronk, the witness, to Mr. Morrison, as sworn to by him, was materially different from what he testified to on the stand, was strictly true. It was materially different; for he testified that he read the note to Conly in an ordinary audible voice, when, according to Morrison's testimony, he stated to him that he could not tell in what tone of voice he read it, whether it was his ordinary audible tone or not. The fact therefore stated by the court was strictly true, and they simply stated the fact; they did not charge the jury that the testimony of Cronk was on that or any other account to be disbelieved; they left the whole matter of fact fairly to the jury.

It was suggested upon the argument that the indictment was bad, in not charging loss or prejudice to have been sustained by Conly. This was not necessary. This is a new offense created by the revised statutes: 2 Rev. Stat. 677, sec. 53. They have added to the statute as it stood before, 1 Rev. L. 410, sec. 13, the obtaining by false pretenses the signature of any person to any written instrument. The offense is complete when the signature is obtained by false pretenses with intent to cheat or defraud another. It is not essential to the offense that actual loss or injury should be sustained. This was held

in the case of the *People v. Stone*, 9 Wend. 190. That case arose before the revised statutes, and was decided upon the law of 1813: 1 Rev. L. 410, sec. 13. The offense charged was the obtaining the indorsement of one Filley upon several notes by false pretenses. It was held that such indorsement, where the note was actually passed and made productive, was to be considered as money, goods, or chattels, or other effects within the meaning of the act. But I expressed a doubt whether a note thus obtained, where no use had been made of it, would be considered either money, goods, or chattels, or a valuable thing; but I also observed that under the revised statutes the offense was complete when the signature was obtained.

Let the proceedings be remitted to the sessions, with directions to proceed and render judgment.

NO ONE NEED BE SHOWN TO HAVE BEEN PREJUDICED by a forgery in an indictment therefor. See the note to *Arnold v. Cost*, 22 Am. Dec. 314. So, in an indictment for obtaining a signature to a written instrument by false pretenses, as in the principal case, actual loss or prejudice to any person need not be shown, but the instrument must be such as to be capable of working an injury to the person whose signature is obtained: *People v. Gallo-way*, 17 Wend. 542; *People v. Sully*, 5 Park. Crim. 170, both citing *People v. Genung*.

EVIDENCE OF AN OFFER OF COMPROMISE OF A FELONY by a prosecuting witness in consideration of a settlement of his claim against the defendant is not admissible for the purpose of contradicting or impeaching him. So held, on the authority of *People v. Genung*, in *People v. Austin*, 1 Park. Crim. 158; *Nation v. People*, 6 Id. 259. So in a civil case a witness can not be questioned about a collateral matter for the purpose of discrediting him: *Pool v. Curtis*, 3 N. Y. Sup. Ct. (T. & C.) 231.

OTHER POINTS TO WHICH THE CASE IS CITED are that obtaining a signature to a writing by false pretenses was first recognized as a statutory offense by the revised statutes: *Dord v. People*, 9 Barb. 673; as to what does not constitute an impeachment of a witness: *Gaudolfo v. Appleton*, 40 N. Y. 540.

BOOKS OF ACCOUNT AS EVIDENCE: See the note to *Union Bank v. Knapp*, 15 Am. Dec. 191; see also *Kaughey v. Brewer*, 16 Id. 554; *Boyd v. Ladson*, 17 Id. 707; *Drummond v. Hyams*, 18 Id. 649; *Smith v. Sanford*, 22 Id. 415.

BEARDSLEE v. RICHARDSON.

[11 WENDELL, 26.]

ONE RECEIVING A SEALED LETTER CONTAINING MONEY FOR DELIVERY to another, and failing to deliver, is not liable for money had and received, etc., where there is no evidence of his opening the letter.

GRATUITOUS BAILEE IS LIABLE only for gross negligence.

EVIDENCE OF A DEMAND AND REFUSAL IS SUFFICIENT to throw upon such bailee the burden of showing that the property was lost without his fault or gross negligence.

ACTION on the case for the non-delivery of a bank note for one hundred dollars, the property of the plaintiff, which was delivered to the defendant at New Orleans, and which he promised to carry and deliver to the plaintiff in New York. The declaration also contained the common money counts. It was proved at the circuit that the note in question was delivered to the defendant in a sealed letter addressed to the plaintiff, but that he was informed of that fact and promised to deliver the letter as soon as he arrived in the place where the plaintiff lived. No evidence of a demand was introduced, but it was shown that the defendant had arrived in the vicinity of the plaintiff's place of residence over a year before this action was commenced, but had never delivered the letter. A nonsuit was refused. The judge instructed the jury that although the plaintiff could not recover on the special counts, he would submit it to the jury as to whether or not there should be a verdict on the money counts. He left it to them to say whether, if a demand was necessary, it might not be presumed from the great delay in delivering the letter; and he charged them also that although the defendant was a gratuitous bailee, enough had been shown to put upon him the *onus* of accounting for the packet. Verdict for the plaintiff. Motion for a new trial.

J. A. Spencer, for the defendant.

C. P. Kirkland, for the plaintiff.

By Court, SAVAGE, C. J. If the defendant was liable upon the money counts, he was not liable as bailee, but as having received the money of the plaintiff for his use. The evidence does not prove that fact, nor does it show that he received it otherwise than in a sealed letter. It can not be said to be money in the defendant's hands; unless he broke the seal, it could not answer the purposes of money, and there is no evidence of such act.

It was a sealed package of the value of one hundred dollars, which the defendant, as bailee, without reward, undertook to deliver. It was held at the circuit, and, I think, correctly, that the plaintiff could not recover upon his special counts, which charged the defendant as bailee. The defendant was liable for gross neglect only; and whether he was guilty of any neglect, does not sufficiently appear from the testimony. It does not

appear that any demand was made, or application of any kind, until the suit was brought. The plaintiff was bound to show that the money was lost by the defendant's negligence, or could not be obtained on request. Had he shown a demand and refusal, the defendant, I think, would have been bound to account for the loss, and to indemnify the plaintiff, unless he could show the property lost without fault on his part, that is, without gross negligence.

New trial granted, costs to abide event.

GRATUITOUS BAILEE, LIABILITY OF.—See *Foster v. Essex Bank*, 9 Am. Dec. 168; *Stanton v. Bell*, 11 Id. 744. That such a bailee is liable only for gross negligence, is held, citing *Beardslee v. Richardson*, in *Haynie v. Waring*, 29 Ala. 265; *Skelley v. Kahn*, 17 Ill. 171; *Lampley v. Scott*, 24 Miss. 533; *Eddy v. Livingston*, 35 Mo. 493; *Bissell v. New York etc. R. R. Co.*, 29 Barb. 615; *Needles v. Howard*, 1 E. D. Smith, 62; *Grant v. Ludlow's Adm'r*, 8 Ohio St. 48.

BURDEN OF PROOF AS TO NEGLIGENCE BY A BAILEE.—See, on this point, especially with reference to warehousemen, the note to *Schmidt v. Blood*, 24 Am. Dec. 143. The principal case is recognized as an authority on this point, particularly as to the *onus* being on the bailee after proof of a demand and refusal, in *United States Telegraph Co. v. Gildersleeve*, 29 Md. 249; *Jennison v. Parker*, 7 Mich. 363; *Wiser v. Chesley*, 53 Mo. 50; *Willard v. Bridge*, 4 Barb. 368; *Neustadt v. Adams*, 5 Duer, 47; *Lamb v. Camden etc. R. R. Co.*, 46 N. Y. 289, *per* Peckham, J., dissenting; *Phelps v. Bostwick*, 22 Barb. 318; *Brown v. Arnott*, 6 Watts & S. 422; *Whitesides v. Russell*, 8 Id. 49; *Beckman v. Shouse*, 5 Rawle, 190; *Verner v. Sweitzer*, 32 Pa. St. 214.

Other cases citing *Beardslee v. Richardson* on various points are: *Carter v. Buchannon*, 3 Ga. 518; *Frink v. Coe*, 4 G. Greene, 557; *Coykendall v. Eaton*, 55 Barb. 193; *S. O.*, 37 How. Pr. 449; *Stewart v. Western Union R. R. Co.*, 4 Biss. 364.

CHAPMAN v. DYETT.

[11 WENDELL, 31.]

ISSUANCE OF CA. SA. BEFORE A FL. FA. has been sued out and returned, where special bail has been filed, is irregular, and may be set aside on the defendant's application.

DEFENDANT ALONE CAN TAKE ADVANTAGE of such irregularity.

CA. SA. SO ISSUED IS VOIDABLE ONLY and is a justification to the officer and party until set aside.

AFTER SUCH CA. SA. IS SET ASIDE, A PREVIOUS ARREST under it becomes a trespass by relation, for which trespass will lie.

IN AN ACTION FOR SUCH AN ARREST, NOTICE OF BAIL need not be shown to have been regularly given in the original action.

FACT THAT THE PLAINTIFF HAS ASSIGNED to another his right to the damages, is no defense to such action.

ACTION for false imprisonment. It appeared at the circuit that the arrest complained of was made under a *ca. sa.*, issued

before the issuance and return of a *fi. fa.*, in an action in which special bail had been put in, and that the *ca. sa.* was afterwards set aside as irregular. The defendants, upon these facts, moved for a nonsuit on the ground that as the *ca. sa.* was voidable and not void, the action should have been case and not trespass, and because it should have been shown that notice of bail was duly given in the action in which the *ca. sa.* issued. Motion denied. The defendants proved that before this action was brought, the plaintiff gave them notice that he had assigned his interest therein to another, and they insisted that this was evidence that he had received satisfaction, and was a bar to the action, but the judge ruled otherwise. Verdict for the plaintiff, and motion for a new trial.

J. A. Lott and H. W. Warner, for the defendants.

S. P. Staples, for the plaintiff.

By Court, SAVAGE, C. J. It is insisted by the defendants that, as the *ca. sa.* was voidable only, and not absolutely void, trespass is not the proper form of action to which the plaintiff ought to have resorted in this case. It has been settled by the decisions of this court, that the issuing of a *ca. sa.*, in an action in which special bail had been filed, previous to the suing out and return of a *fi. fa.*, is irregular, and may be set aside on the application of the defendant. The defendant alone, however, can take advantage of the irregularity. If bail are sued after the return of such a *ca. sa.*, it is no defense to them that a *fi. fa.* had not been previously issued. So, if the sheriff is sued for an escape of a person confined upon a *ca. sa.* so issued, it is no answer for him to say that the *ca. sa.* was irregularly sued out; and the reason is, that it is optional with the defendant in the *ca. sa.* to consider it regular or not; it is voidable at his election. It is not therefore void, but is a justification to the officer, and to the party also, until set aside. It is true, as contended by the defendants, that when the arrest was made, no trespass was in fact committed; but the doctrine of trespass by relation is as well settled as any in the law, at least, since the *Six Carpenters' case*. When the *ca. sa.* was set aside for irregularity, it ceased to be a justification to the parties guilty of the irregularity; as to them it is void, and as if it had never existed. The arrest, therefore, by relation, became void and without authority, and the action of trespass was the proper action. The judge therefore decided correctly in refusing to nonsuit the plaintiff on the objection to the form of action. On the motion to set aside the *ca. sa.*, the fact that notice of bail

had been given must have been shown: 6 Cow. 608; at all events, it was a matter not inquirable into on the trial of this cause.

The other point made upon the argument is equally untenable. Whether the plaintiff had assigned the damages to be recovered in this suit to another or not was immaterial. The questions were whether the defendants had been guilty of a trespass; and if so, what damages ought they to pay. It was not pretended that the consideration paid for the assignment was paid by the defendants; there was no pretense of an accord and satisfaction; there was no reason offered to the court why the plaintiff should not recover, and the defendants pay the damages which the plaintiff had sustained. Whether those damages are to be received by Chapman or Talman can make no difference to the defendants. They are to atone for the violation of the law of which they have been guilty; the consideration paid by Talman to Chapman constitutes no such atonement. Whether such a case of action is assignable, is not now a question; but whether it is or is not, the suit must be in the name of Chapman.

New trial denied.

WRONGFUL ARREST, WHO LIABLE FOR.—See the note to *Bissell v. Gold*, 19 Am. Dec. 490.

PROCESS IS A JUSTIFICATION FOR ACTS DONE UNDER IT, WHEN.—See the note to *Savacool v. Boughton*, 21 Am. Dec. 109. See, also, *Wilcox v. Smith*, Id. 213; *Miller v. Brown*, 23 Id. 693; *McCoy v. Curtice*, 24 Id. 113; *Reynolds v. Moore*, Id. 116; *Baker v. Freeman*, Id. 117. That voidable process is in general a justification both to the officer and to the party until set aside, is held, citing *Chapman v. Dyett*, in *Dominick v. Eacker*, 3 Barb. 19; *Roth v. Schloss*, 6 Id. 313. But process which has been set aside for irregularity is no justification for acts previously done under it, so far as the party is concerned: *Kerr v. Mount*, 28 N. Y. 664, 666; *Kissock v. Grant*, 34 Barb. 149; *Peck v. Yorks*, 32 How. Pr. 410; *Ackroyd v. Ackroyd*, 3 Daly, 42; *Hall v. Munger*, 5 Leds. 105, all citing the principal case. It is distinguished on this point in *Landt v. Hills*, 19 Barb. 290.

ERRONEOUS AND IRREGULAR PROCESS, WHAT IS.—See *Woodcock v. Bennet*, 13 Am. Dec. 568; *Allen v. Huntington*, 16 Id. 702; *Miller v. Howry*, 24 Id. 320. In *Dominick v. Eacker*, 3 Barb. 19, it is said that in the principal case "irregular" is confounded with "erroneous," as applied to voidable process.

THAT REGULARITY OF PROCESS CAN NOT BE ATTACKED COLLATERALLY in an action against one acting under it, is held, citing the principal case, in *Brown v. Bleakley*, 23 How. Pr. 126, and *Hallock v. Dominy*, 69 N. Y. 241. As to the necessity of setting aside an irregular *ca. sa.* before bringing an action for an arrest under it, the case is cited in *Deyo v. Van Valkenburgh*, 5 Hill, 246.

CA. SA. FOR RESIDUE CAN NOT ISSUE BEFORE FI. FA. issued and returned, in Maryland: *Turner v. Walker*, 22 Am. Dec. 329.

RELATION, DOCTRINE OF, is discussed at length in the note to *Jackson v. Ramsay*, 15 Am. Dec. 242.

HALL v. PENNEY.

[11 WENDELL, 44.]

CLOTH FROM THE WOOL OF TEN SHEEP IS EXEMPT from execution against a householder who does not own any sheep.

ERROR from the common pleas, in an action of trespass originally brought in a justice's court for taking a quantity of cloth. The defendant justified the taking, as constable, on an execution against the plaintiff. The plaintiff claimed that the cloth was exempt under the statute, as being no more than the product of the wool of ten sheep. It was proved that the plaintiff, a householder, did not own any sheep. Other facts are stated in the opinion. The defendant had judgment in the justice's court, which was reversed on certiorari in the common pleas, and the defendant sued out this writ of error.

P. G. Childs, for the plaintiff in error.

W. J. Hough, for the defendant in error.

By Court, NELSON, J. There is some evidence upon which it is contended that the plaintiff below had more wool in 1829 than the probable produce of ten sheep; but I think the facts do not warrant such a conclusion. The wool from which the cloth in question was manufactured, the plaintiff had in 1828, and it does not appear that he had any other wool in that year. The only question in the case is, whether wool, or articles manufactured from it, not exceeding in quantity the fleeces from ten sheep, are exempt from execution in the hands of a person not owning any sheep. The statute enacts, that "all sheep to the number of ten, with their fleeces and the yarn or cloth manufactured from the same," shall be exempt from execution: 2 Rev. Stat. 255, sec. 169, sub. 4. The object and intent of the statute can not be mistaken; it is to secure to the family of a householder, wool, or the article manufactured from it, equal in amount to that grown on a given number of sheep, and the terms used in the act were intended to effect that intent. No other purpose could have been within the view of the legislature. The exemption of the sheep alone would be a useless boon; it is the wool grown upon the sheep which gives value to this provision to a poor family. It is a settled rule, that such construction shall be given to a statute as may best answer the intention which the makers had in view. The intention of the makers of a statute is sometimes to be collected from the cause or neces-

sity of making it; and when this can be discovered, it ought to be followed with reason and discretion in the construction to be put upon it, although such construction seems contrary to its letter: *Bac. Abr.*, tit. Statute, P, 384. These are familiar principles in construing statutes, and are in point. The judgment of the common pleas, therefore, is right, and must be affirmed.

Judgment affirmed.

YARN OF HOUSEHOLDER IS EXEMPT to the amount specified in the statute, though he did not own any sheep: *Brackett v. Watkins*, 21 Wend. 68, citing the principal case.

THAT TRESPASS LIES FOR SEIZING EXEMPT PROPERTY is held, referring to *Hall v. Penney*, as authority, in *Connah v. Hale*, 23 Wend. 466.

STATUTE RELATING TO EXEMPTION SHOULD BE LIBERALLY CONSTRUED: *Farrrell v. Higley*, Hill & D. 88; *Griffin v. Sutherland*, 14 Barb. 459; *Allen v. Cook*, 26 Id. 379, all citing *Hall v. Penney*.

WALDEN v. DAVISON.

[11 WENDELL, 65.]

NOTICE TO PRODUCE A LETTER CONCERNING AN EXECUTION, produced on a former trial, "and all other papers" in the defendant's custody "relating to the matter in controversy in this cause," is sufficient to require the production of the execution, in an action for money collected thereon, and to let in secondary evidence of the contents of such execution, where the letter and execution were produced by the defendant himself on the former trial.

NOTICE TO PRODUCE PAPERS IS SUFFICIENTLY SPECIFIC if it fairly apprises the party, under the circumstances, as to what particular papers are wanted.

ASSUMPSIT to recover money collected on an execution in favor of the plaintiff by one Wilson, one of the deputies of the defendant, as sheriff. This was a second trial of the cause. The plaintiff having duly served the defendant's attorney with notice to produce a certain letter written by the plaintiff to Wilson, relating to the execution in the case, "which was produced on the former trial, and all other papers in your custody or power, relating to the matter in controversy in this cause," demanded the production of the execution, which the defendant's attorney refused because it was not in his possession or control. Secondary evidence of the contents of the execution was then offered and rejected, on the ground of the insufficiency of the notice. The plaintiff being nonsuited, moved to set aside the nonsuit. Other facts are stated in the opinion.

M. T. Reynolds, for the plaintiff.

J. A. Spencer, for the defendant.

By Court, SUTHERLAND, J. The judge erred in rejecting secondary evidence of the execution sent to the deputy on the thirty-first of October, 1820. The notice to the defendant's attorney was, under the circumstances of the case, sufficiently specific to apprise him that this execution was one of the papers which he was called upon and expected to produce. The notice required him to produce a letter written by the plaintiff to Wilson, in relation to a certain execution in this cause, which was produced on the former trial, and also all other papers in his custody or power relating to the matter in controversy in this cause. The defendant's attorney himself introduced the letter and execution in evidence on the former trial, and when the trial was closed, took them into his possession for the purpose of making a case, in order to move for a new trial. He knew, then, that his execution was a paper relating to the matter in controversy in this cause; he did not pretend that he was misled by the general terms of the notice; that he was not apprised by it that the execution was wanted; but his excuse for not producing it was, that it was not in his possession or under his control.

Conceding that a notice in general terms to produce all papers in the possession or under the control of a party, relating to a particular cause or controversy, would, in general, be held to be of no force or effect, still I think the particular circumstances of this case to which I have adverted, would take it out of the operation of such rule. It is true, the plaintiff might have made his notice morespecific, but if it was sufficiently specific, under the circumstances of the case, fairly to apprise the party to whom it was given, that this particular paper was wanted, the object of a notice was accomplished. I think the defendant's attorney could not for a moment have doubted that the execution was the principal paper or document which the plaintiff wished and expected him to produce under the notice. Evidence of its contents should therefore have been received, and the judge erred in rejecting it. On this ground a new trial must be granted.

New trial granted.

WILLIAMS v. MERLE.

[11 WENDELL, 80.]

OWNER OF PROPERTY CAN NOT BE DIVESTED OF IT except by his consent, or by operation of law.

BONA FIDE PURCHASER FROM ONE WHO HAS NO TITLE or authority to sell, acquires no title against the true owner.

CERTIFICATE OF THE INSPECTOR OF POT AND PEARL ASHES, under the statute, does not determine the title so as to protect a *bona fide* purchaser.

BROKER PURCHASING PROPERTY FROM ONE WHO HAS NO TITLE, for value, and *bona fide*, and shipping it to his principal, is liable in trover to the true owner.

TROVER for the conversion of certain pot-ashes. At the trial it appeared that one Morgan, master of a vessel, took the ashes by mistake from a certain warehouse, and on discovering the mistake, delivered them to Shankland, the clerk of the owners of the vessel, who took them to an inspector's office, obtained a certificate of inspection, and sold them for a fair price to the defendant, as broker, who received the certificate and shipped the goods to his principal. A subsequent demand was proved, and the defendant refused to account, saying that he had bought and paid for the goods a year before. Verdict for the plaintiffs, under the direction of the judge, reserving for this court the question of the plaintiffs' right to recover.

S. Stevens, for the plaintiffs.

C. Graham, for the defendant.

By Court, SAVAGE, C. J. The question is, whether the plaintiffs are entitled to recover upon the facts of this case. That they had title to the property does not admit of dispute. Has that title been transferred to the defendant, and in what manner? The owner of property can not be divested of it but by his own consent, or by operation of law. Morgan, who took the property by mistake, certainly acquired no title. Shankland, the clerk, surely had no title. If the defendant has title, it comes to him from a person who had none. In the language of Mr. Justice Sutherland, in *Everett v. Coffin*, 6 Wend. 609, "the disposing or assuming to dispose of another man's goods, without his authority, is the gist of this action, and it is no answer for the defendants that they acted under instructions from another, who had himself no authority." This same principle was asserted by this court in *Prescott v. Deforest*, 16 Johns. 159, where it was held that a landlord who distrained and sold the goods of his tenant, conveyed no title to the pur-

chaser, the distress being unauthorized. The court said, that if Satterlee (the landlord) had no right to distrain and sell the goods, it necessarily follows that the defendant, though a *bona fide* purchaser for valuable consideration, acquired no title. So far, then, as the defendant's title depends upon the purchase by him in good faith, and for valuable consideration, it is still without foundation, so long as the seller had neither title nor authority to sell. The owners were not in fault; the property was taken without their consent or knowledge. The maxim *caveat emptor* applies; the purchaser must look to the seller for indemnity.

The defendant's counsel contends, that the act of the legislature in relation to the inspection of pot and pearl ashes has placed that article upon a different footing from other merchandise. The act declares that the certificate of the inspector shall be received as presumptive evidence of the facts contained therein; and that such ashes shall be sold in the city of New York by the weigh note of the inspector, except when sold by retail: 1 Rev. Stat. 548, secs. 66, 77. See also, 2 Rev. L. 333, sec. 3. This act does not authorize the inspector to declare who is the owner; he gives the certificate to the person in possession of the ashes, but has no power to determine the question of title. The certificate is evidence of the facts of inspection, and such other facts as he is required to state. He is to determine the quality, to mark the weight and the tare, and some other facts, such as crustings and scrapings, the damage appearing upon inspection and the cause thereof; and as to these facts, the certificate is to be presumptive evidence, but surely of nothing more.

The defendant stands in no better situation than any other who purchases an article from a party without title or authority, to dispose of such article; in such case, the purchaser acquires no title. The true owner has a right to reclaim his property and to hold any one responsible who has assumed the right to dispose of it.

The plaintiffs are, therefore, entitled to judgment upon the verdict.

WHEN PURCHASER GETS TITLE NOTWITHSTANDING TRUE OWNER'S CLAIM.

The cases in which a purchaser of goods from one who is not the owner, and who has no authority to dispose of them, acquires a title thereto by his purchase, are all exceptions to the general rule of law on this subject. It is proper, therefore, before entering upon a discussion of these exceptions, to state briefly what that rule is, and to refer to some of the cases illustrating its operation.

PURCHASER GETS NO TITLE IF HIS VENDOR HAS NONE, or has no authority from the owner. This is undoubtedly the general rule, not only of the common, but of the civil law. It is tersely expressed in the often-quoted maxim: *Nemo plus juris ad alium transferre potest quam ipse habet*: 2 Kent Com. 324; *Ventress v. Smith*, 10 Pet. 175. It matters not, therefore, how innocent or honest the conduct of the purchaser may be, if the vendor has no title or power of disposition, and the case does not fall within one of the exceptions hereafter to be noted, the sale transfers no title as against the real owner: Benj. on Sales, (2d Am. ed.) sec. 6; *Wheelwright v. Depeyster*, 3 Am. Dec. 345; American note to *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. (7th Am. ed.), 1195; *Benton v. Curryea*, 40 Ill. 320; *Poole v. Adkisson*, 1 Dana, 110; *Gilmore v. Newton*, 9 Allen, 171; *Wilson v. Crocket*, 43 Mo. 216; *Jackson v. Anderson*, 4 Wend. 474; *Arnold v. Hallenbake*, 5 Id. 33; *Sillman v. Hurd*, 10 Tex. 109; *Scudder v. Calais Steamboat Co.*, 1 Cliff. 381; *Mitchell v. Hawley*, 16 Wall. 550. The purchaser has no lien for repairs made on the property without the owner's knowledge or consent: *Clark v. Hale*, 34 Conn. 398.

CASES IN WHICH STOLEN PROPERTY, or property tortiously taken from the owner, is the subject of sale, furnish frequent illustrations of the application of the general rule above mentioned. A *bona fide* purchaser of such property gets no title: *Peer v. Humphrey*, 2 Ad. & El. 495; *Stone v. Marsh*, 5 Barn. & Cress. 551; *White v. Spettigue*, 13 Mea. & W. 603; *Lee v. Bayes*, 18 Com. B. 599; *Beasley v. Mitchell*, 9 Ala. 780; *Sharp v. Parks*, 48 Ill. 511; *Robinson v. Skipworth*, 23 Ind. 311; *Breckenridge v. McAfee*, 54 Id. 141; *Basset v. Green*, 2 Duv. 560; *McGrew v. Browder*, 2 Mart. N. S. 17; *Towne v. Collins*, 14 Mass. 500; *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Heckle v. Lurvey*, 101 Mass. 344; *Hoffman v. Carow*, 20 Wend. 21; S. C., 22 Id. 285; *Newton v. Porter*, 5 Lans. 432; *Roberts v. Dillon*, 3 Daly, 52; *Justh v. National Bank*, 36 N. Y. Sup. Ct. (4 Jones & S.) 276; S. C., 45 How. Pr. 494; *Barker v. Dinmore*, 72 Pa. St. 427, S. C., 13 Am. Rep. 697; *Dodd v. Arnold*, 28 Tex. 97; *Courtis v. Cane*, 32 Vt. 232. And it is immaterial whether the original taking was larceny at common law, or by statute, the effect being the same in either case: *Breckenridge v. McAfee*, 54 Ind. 141. The purchaser of goods so taken, however innocent he may be, is liable for their value in trover without a demand and refusal: *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Heckle v. Lurvey*, 101 Mass. 344; *Courtis v. Cane*, 32 Vt. 232. So though he has resold the property in good faith before receiving notice of the felony: *Sharp v. Parks*, 48 Ill. 511; *Robinson v. Skipworth*, 23 Ind. 311. So it has been held, that an auctioneer selling stolen goods, and paying over the proceeds before receiving notice of the felony, was liable to the owner in trover: *Hoffman v. Carow*, 20 Wend. 21; S. C., 22 Id. 285. These cases show that a title acquired from a thief "is worse than none," as was said in *McGrew v. Browder*, 2 Mart. N. S. 17.

PURCHASER LIABLE BEFORE PROSECUTION OF THIEF.—It was laid down by Best, C. J., in *Gimson v. Woodfall*, 2 Car. & P. 41, that the owner of goods which had been stolen could not maintain an action for them against a *bona fide* purchaser, without first prosecuting the thief. "I take it," said he, "the law is this: You must do your duty to the public before you seek a benefit to yourself." But this decision was overruled in *White v. Spettigue*, 13 Mea. & W. 603; although it was admitted that if the action were against the thief himself, the rule would apply. In that case Rolfe, B., said on this point: "I think the true principle is, that where a criminal, and consequently an injurious act towards the public, has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for

the civil injury to the prejudice of public justice, and to waive the felony, and go for the conversion. I think the law as laid down in that case [*Gimson v. Woodfall, supra*], instead of advancing public justice, would be productive of very great injustice. It amounts to this, that another person who has got possession of my goods, of which I have been robbed, may keep them until I prosecute some innocent person whom I may suspect, or find out for that purpose." To the same effect, on this point, are *Stone v. Marsh*, 5 Barn. & Cress. 551, and *Lee v. Bayes*, 18 Com. B. 599. So in *Beazley v. Mitchell*, 9 Ala. 780, and *Robinson v. Skipworth*, 23 Ind. 311, it was determined that an action might be maintained against a purchaser of stolen goods without a previous prosecution of the thief. But the owner's right of action against the thief himself, it is held in *Foster v. Tucker*, 14 Am. Dec. 243, and *Boody v. Keating*, 4 Greenl. 164, is suspended until there has been a criminal prosecution. For a full discussion of the general question, as to when a civil right of action is merged in a felony, see the note to *Foster v. Tucker*, 14 Am. Dec. 245.

SALES IN MARKET OVERT IN ENGLAND, constitute a prominent exception to the general rule that no one can transfer even to a *bona fide* purchaser any greater or better title than he himself has. The doctrine respecting sales in markets overt is of Saxon origin: 2 Kent Com. 324, note (a); *Bryant v. Whitcher*, 52 N. H. 158. It was adopted at a time when theft, plunder, and sale were among the principal modes of transferring property, and was designed to discountenance private sales, by providing special protection for purchasers at sales in open, public markets: *Bryant v. Whitcher*, 52 N. H. 158. Says Cockburn, C. J., in *Crane v. London Dock Co.*, 5 Best & S. 313; S. C., 33 L. J. Q. B. 224: "Look to the origin of the law as to such sales. It arose at a time when there was much greater simplicity of practice between buyer and seller. The practice then was to buy in markets and fairs. Shops were very few in London, and persons whose goods were taken feloniously would know to what place to resort in order to find them. I can, therefore, quite understand that the law in question was established for the protection of buyers, that if a man did not pursue his goods to a market where such goods were openly sold, he ought not to interfere with the right of the honest and *bona fide* purchaser."

It became, accordingly, the established rule at an early day in England, that a sale in market overt to a *bona fide* purchaser, transferred a complete title against all the world, except in certain special cases: 2 Bl. Com. 449; 2 Kent Com. 323; Benj. on Sales, sec. 8; 2 Inst. 220, 713; Com. Dig., Market, E; *Case of Market Overt*, 5 Co. 83, b; *Peer v. Humphrey*, 2 Ad. & El. 495; *Lee v. Bayes*, 18 Conn. B. 599; *Cundy v. Lindsay*, 3 App. Cas. 459; S. C., 47 L. J. Q. B. 48; 38 L. T. 573; 26 W. R. 406, affirming S. C., 2 Q. B. D. 96; 46 L. J. Q. B. 233; 36 L. T. 345; 25 W. R. 417; 13 Cox C. C. 583. "Market overt in the country is only held on the special days provided for particular towns by charter or prescription; but in London, every day, except Sundays, is market-day. The market-place, or spot of ground set apart by custom for the sale of particular goods, is also, in the country, the only market overt; but in London, every shop in which goods are exposed publicly to sale is market overt, for such things only as the owner professes to trade in:" 2 Bl. Com. 449; Cro. Jac. 68; Godb. 131; *Case of Market Overt*, 5 Co. 83, b; 1st Mod. 521; Benj. on Sales, sec. 8. By market overt is meant, an "open, public, and legally constituted market:" *Lee v. Bayes*, 18 Conn. B. 599, per J. J. A wharf in London is not market overt, even though goods accustomed to be sold there: *Wilkinson v. King*, 2 Camp. 335. So a re

the Strand is not a sale in market overt: *Anonymous*, 12 Mod. 521. So a sale of a horse at auction at a horse repository out of London: *Lee v. Bayes*, 18 Com. B. 599. A London shop is market overt only for goods usually dealt in there. Hence a scrivener's shop is not market overt for silver plate. Cheapside is not market overt for horses, nor Smithfield for clothes: *L'Evesque de Worcester's case*, Moore, 360; Poph. 84; 1 And. 344; 2 Roll. Abr., Market Overt. So a mercer's shop is not market overt for the sale of petticoats or cloaks: *Taylor v. Chambers*, Cro. Jac. 68. The sale must be openly made: *Clinton v. Chancellor*, Moore, 624. Hence, a sale in an inner room, or behind a curtain, or where some of the shop windows are shut, or after sunset, has been held not to be within the rule: *L'Evesque de Worcester's case*, Moore, 360; Poph. 84; 1 And. 344; 2 Inst. 714. But where a sale is made in an open shop in London, of goods usually sold there, it is a sale in market overt, though the premises are described in the evidence as a warehouse, and the building is not sufficiently open to the street for one passing to see what is going on inside: *Lyons v. De Pass*, 11 Ad. & El. 326. In that case Mr. Justice Littledale said: "It can not be made a difficulty that there is now glass in the windows of shops, whereas in former times they were entirely open. Many shops now are more open in their construction than others; but no difference can be made on that account." It is further necessary that the sale should be completed as well as begun in the open market, and that the goods should be present and exposed to view. Hence, a sale by sample is not within the protection of the rule applying to sales in market overt: *Hill v. Smith*, 4 Taunt. 520; *Crane v. London Dock Co.*, 5 Best & S. 313; S. C., 33 L. J. Q. B. 224.

It is somewhat questionable whether a shop is market overt for sales made to the shopkeeper even of goods usually sold there: *Crane v. London Dock Co.*, 5 Best & S. 313; S. C., 33 L. J. Q. B. 224. A sale to the shopkeeper was held within the rule, however, in *Lyons v. De Pass*, 11 Ad. & El. 326, although the point was not directly raised. A custom that a sale at a shop in Bristol should be binding against the real owner, *modo unus contrahentium sit liber homo civitatis*, was held bad in *Clifton v. Chancellor*, Moore, 624, because it constituted a monopoly, and it was further determined that the king could not make one's shop a market overt to bind strangers.

A sale in market overt binds infants, *femes-covert*, prisoners, and persons beyond seas: 2 Inst. 713; Com. Dig., Market, E. But the king is not bound thereby: Benj. on Sales, sec. 9. A sale in market overt is no protection to one who is not a *bona fide* purchaser, as where the purchaser knows that the vendor has no title or authority to sell: 2 Inst. 713; *Freeman v. East India Co.*, 5 Barn. & Ald. 624; *per* Best, J.; *Barker v. Reading*, Sir Wm. Jones, 163. The doctrine of sales in market overt does not apply to gifts or pawns: Benj. on Sales, sec. 9; *Hartop v. Hoare*, 2 Stra. 1187; S. C., 3 Atk. 44. By the statute 1 Jac. I., c. 21, it was expressly provided that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, should not alter the property, for the reason, as Blackstone says, that this trade is usually of a clandestine character: 2 Bl. Com. 449. Where one purchases his own goods in market overt, he is not bound to render the price: Perk., sec. 93; 2 Bl. Com. 450. And after a sale in market overt by a vendor who has no title, if such vendor come again into possession of the goods, the true owner may retake them from him: 2 Bl. Com. 450; 2 Inst. 713; Benj. on Sales, sec. 9.

It is laid down in 2 Inst. 714, and Com. Dig., Market, E, that if a man pursue his appeal freshly against a felon of his goods, till conviction, he shall have restitution of the goods, notwithstanding a sale in market overt. It is

now provided by statute 24 and 25 Victoria, c. 9, sec. 100, re-enacting and extending statute 7 and 8 Geo. IV., c. 29, sec. 57, and 21 Hen. VIII., c. 11, that if one who has stolen, embezzled, etc., another's goods, be indicted and convicted on behalf of the owner, or his executor or administrator, the property shall be restored to such owner or his representative, and the court shall order such restitution to be made: Benj. on Sales, sec. 11. Under this statute, it seems that the property reverts in the owner on conviction of the thief, without any order of restitution: *Scattergood v. Sylvester*, 15 Q. B. (Ad. & El. N. S.) 506. But where a *bona fide* purchaser in market overt has sold the goods before the thief has been convicted, he is not liable in trover to the owner: *Horwood v. Smith*, 2 T. R. 750.

Several statutes regulating sales of horses in market overt have been enacted in England: 2 and 3 P. & M., c. 7; 31 Eliz., c. 12. Their provisions are stated at length in Benj. on Sales, sec. 14. They are, in substance, that certain places shall be set apart in fairs and markets for the sale of horses; that every horse there sold shall be publicly exposed for one hour between ten o'clock and sunset; that there shall be a toll-keeper, who shall make a record of all sales, describing the property and giving the names and addresses of the parties, the price paid, etc.: Com. Dig., Market, E. These statutes extend to sales of horses taken by wrong, though not stolen: *Barker v. Reading*, Sir Wm. Jones, 163.

A sale in market overt must be pleaded to have been so made to entitle the purchaser to the protection of the rule: *Clifton v. Chancellor*, Moore, 624; Com. Dig., Market, E. So a custom of market overt in London shops must be pleaded, and will not be judicially noticed: *Hartop v. Hoare*, 2 Stra. 1187; S. C., 3 Atk. 44.

DOCTRINE OF SALE IN MARKET OVERT NOT ADOPTED IN AMERICA.—The rule that a sale is market overt protects a *bona fide* purchaser against the claims of the real owner from whom the property has been stolen or tortiously taken, has never been adopted in this country: 3 Kent Com. 324; Hilliard on Sales (3d ed.), 45; *Wheelwright v. Depeyster*, 3 Am. Dec. 345; *Fawcett v. Osborn*, 32 Ill. 411; *Alexander v. Gusman*, 16 La. An. 251; *Coombs v. Gordon*, 59 Me. 111; *Browning v. Magill*, 2 Har. & J. 308; *Dame v. Balthwin*, 8 Mass. 518; *Towne v. Collins*, 14 Id. 500; *Depew v. Robards*, 17 Mo. 580; *Bryant v. Whitcher*, 52 N. H. 158; *Mowrey v. Walsh*, 8 Cow. 238; *Andrew v. Dieterich*, 14 Wend. 31; *Hoffman v. Carow*, 20 Id. 21; *Roberts v. Dillon*, 3 Daly, 50; *Roland v. Gundy*, 5 Ohio, 203; *Hosack v. Weaver*, 1 Yeates, 478; *Hardy v. Metzgar*, 2 Id. 347; *Easton v. Worthington*, 5 Serg. & R. 130; *Carmichael v. Buck*, 10 Rich. S. C. 332; *Arendale v. Morgan*, 5 Sneed, 703; *Griffith v. Fowler*, 18 Vt. 390; *Sanborn v. Kittridge*, 20 Id. 632; *Ventress v. Smith*, 10 Pet. 161. In the case last cited, Thompson, J., speaking for the court, said: "It is a general rule of law, that a sale by a person who has no right to sell, is not valid against the rightful owner. * * * It was a maxim of the civil law, that *nemo plus juris in alium transferre potest, quam ipse habet*; and this is a plain dictate of common sense. It was also a principle of the English common law, that a sale out of market overt, did not change the property from the rightful owner; and the custom of the city of London, which forms an exception to the general rule, has always been regarded and restricted by the courts with great care and vigilance, that all such sales should be brought strictly within the custom: Com. Dig., tit. Market, E. It has sometimes been contended, that a *bona fide* purchase for a valuable consideration and with notice, was equivalent to a purchase in market overt under the English law and bound the property against the party who had right: 1 Johns. 478

we are not aware that this Saxon institution of markets overt, which controls and interferes with the application of the common law, has ever been recognized in any of the United States, or received any judicial sanction." So Mr. Justice Duncan, in *Easton v. Worthington*, 5 Serg. & R. 130, referring to some earlier decisions in the Pennsylvania courts, says: "The uniform determinations of courts of justice have rejected the usage and prescription on which these markets in England are founded, as contrary to honesty and the soundest policy."

It may, therefore, be laid down as the established doctrine in the United States, that a purchaser in a public open market gets no better title to goods than if he had bought at private sale: *Browning v. Magill*, 2 Har. & J. 308; *Fawcett v. Osborn*, 32 Ill. 411. So where one in good faith buys an article in a shop in which such things are usually sold, as a watch in a watch-maker's shop, he gets no title if the vendor has none, and has no authority from the owner: *Roberts v. Dillon*, 3 Daly, 50. It was indeed said in an early case in Vermont, that probate and execution sales and sales of estrays and goods found, were to be considered sales in market overt: *Heacock v. Walker*, 1 Tyler, 341. But this decision was overruled in *Griffith v. Fowler*, 18 Vt. 390, and *Sanborn v. Kittredge*, 20 Id. 632. The validity of such sales, so far as they are valid, depends upon principles entirely distinct from the doctrine of market overt.

SHERIFF'S SALE divests the title of the judgment debtor, and vests it in the purchaser, if the proceedings be fair and regular. So, though the judgment be afterwards reversed for error: *Dyer*, 363 a, pl. 24; *Taylor v. Boyd*, 17 Am. Dec. 603; *Wood v. Jackson*, 22 Id. 603; *Freem. on Ex.*, sec. 345, and cases cited. But it is otherwise if the judgment is reversed or set aside on grounds rendering it void from the beginning, or if the plaintiff in the execution, or his attorney, becomes the purchaser: *Freem. on Ex.*, sec. 345, 347. Where an execution or distress warrant is illegal on its face, the sale confers no title: *Lock v. Sellwood*, 1 Q. B. (Ad. & El. N. S.) 736. If there is no authority for the sale, as where the judgment has been satisfied, the purchaser gets no title: *Jackson v. Anderson*, 4 Wend. 474. An execution sale of exempt property, after notice that the debtor claims the exemption, passes nothing: *Paston v. Freeman*, 22 Am. Dec. 74; *Johnson v. Babcock*, 8 Allen, 583; *Williams v. Miller*, 16 Conn. 144; *Twinam v. Swart*, 4 Lana. 263; *Freem. on Ex.*, sec. 215. But where the debtor being present at the sale does not claim the exemption, but forbids the sale on other grounds, he can not maintain an action against the purchaser, at least without demand: *Twinam v. Swart*, 4 Lana. 263. A sale on meane or final process of the property of a stranger to the writ, does not affect the owner's title: *Symonds v. Hall*, 37 Me. 354; *Coombs v. Gorden*, 59 Id. 111; *Champney v. Smith*, 15 Gray, 512; *Buffum v. Deane*, 8 Cush. 41; *Bryant v. Whitchee*, 52 N. H. 158; *Homesley v. Hogue*, 4 Jones L. (N. C.) 481; *Austin v. Tilden*, 14 Vt. 325; *Griffith v. Fowler*, 18 Id. 390; *Sanborn v. Kittredge*, 20 Id. 632; *Stone v. Ebberley*, 1 Bay, 817; *Shearick v. Huber*, 6 Binn. 2.

TRANSFER OF CASH, BANK BILLS, CHECKS, NOTES payable to bearer, and other negotiable instruments, transferable by delivery, if made in the usual course of trade, for a valuable consideration, in good faith, and without notice of any infirmity in the title, vests an indefeasible property therein in the transferee, on grounds of commercial policy, although they may have been stolen from the owner, or fraudulently disposed of by a depositary or agent of such owner; and this constitutes another exception to the general rule that a vendee of personalty gets no title if his vendor has none, and no

authority to sell: *Benj. on Sales*, sec. 15; *Cruger v. Armstrong*, 2 Am. Dec. 126; *Conroy v. Warren*, Id. 156; *Bay v. Coddington*, 9 Id. 268; *Coddington v. Bay*, 11 Id. 342; *Hall v. Hale*, 8 Conn. 336; *Matthews v. Poythress*, 4 Ga. 287; *Fawcett v. Osborn*, 32 Ill. 411; *Wheeler v. Guild*, 20 Pick. 545; *Merriam v. Granite Bank*, 8 Gray, 254; *Spooner v. Holmes*, 102 Mass. 503; *Magee v. Badger*, 30 Barb. 246; *Lord v. Wilkinson*, 56 Id. 593; *Duchess Co. Mut. Ins. Co. v. Hackfeld*, 73 N. Y. 226; *Greeneaux v. Wheeler*, 6 Tex. 515; *Miller v. Race*, 1 Burr. 452; S. C., 1 Smith Lead. Cas. 597; *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, Doug. 633; *Gorgier v. Mievill*, 3 Barn. & Cress. 45; *Ingham v. Primrose*, 7 Com. B. (N. S.) 82; S. C., 28 L. J. C. P. 294. So, even where a bill has been fraudulently pasted together, after being torn in two by the acceptor, for the purpose of cancellation, and has been transferred to a *bona fide* holder, for value, where the tearing is not different in appearance from that which is done for the purpose of sending a bill by mail: *Ingham v. Primrose*, 7 Com. B. (N. S.) 82; S. C., 28 L. J. C. P. 294. And such *bona fide* holder of a bill or note which has been stolen or fraudulently transferred may recover it from the original owner if he should get possession of it after the *bona fide* transfer: *Greeneaux v. Wheeler*, 6 Tex. 515. But a *bona fide* transferee, without indorsement, of a draft payable to order, who receives notice before the indorsement is made, of a fraud vitiating the title of the person from whom he received it, gets no better title than such person had: *Whistler v. Forster*, 32 L. J. C. P. 161. It was formerly held that where one was guilty of negligence in taking a negotiable instrument which had been stolen or otherwise wrongfully obtained, that is, if he took it under circumstances which ought to have excited the suspicion of a prudent and careful man, he got no title, and could not recover on such instrument: *Gill v. Cubitt*, 3 Barn. & Cress. 466; *Hall v. Hale*, 8 Conn. 336; *Ayer v. Hutchins*, 3 Am. Dec. 232. But this is not now the law. There must be something more than negligence to defeat the title of the holder. The question is, in such cases, did the holder receive the instrument in the usual course of trade, *bona fide*, and for value? Hence, to defeat his title, the circumstances must be such as to show *mala fides*, on his part in taking with notice of the defective title. Negligence is important only as evidence of *mala fides*: *Goodman v. Harvey*, 4 Ad. & El. 870; *Uther v. Rich*, 10 Id. 784; *Bank of Bengal v. Fagan*, 7 Moore P. C. 72; *Backhouse v. Harrison*, 5 Barn. & Ad. 1098; *Raphael v. Bank of England*, 17 Com. B. 161; S. C., 25 L. J. C. P. 33; *Matthews v. Poythress*, 4 Ga. 287; *Lord v. Wilkinson*, 56 Barb. 593; *Duchess Co. Mut. Ins. Co. v. Hackfeld*, 73 N. Y. 226; *Ayer v. Hutchins*, 3 Am. Dec. 232, note. As to whether one who receives a note, bill, or other negotiable instrument as security for an antecedent debt is to be regarded as a *bona fide* holder, as against the true owner, see *Bay v. Coddington*, 9 Am. Dec. 268 and note.

WHERE VENDOR CLOTHED WITH APPARENT AUTHORITY BY OWNER.—Most of the exceptions to the general rule that a *bona fide* purchaser gets no title if the vendor is not the owner, arise from the fact that the real owner has voluntarily clothed such vendor with the apparent ownership or authority to sell. The nature and extent of the exceptions of this class are very clearly stated in the learned opinion of Mr. Senator Verplanck, in *Saltus v. Everett*, 20 Wend. 278. After some remarks on transfers of notes, bills, etc., he says:

"After a careful examination of all the English cases, and those of this state, that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that a honest purchaser who buys for a valuable consideration in the course of

without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has by his own direct, voluntary act conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property, as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more:

"1. The first is when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error, as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a *bona fide* purchaser, in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner: *Mowrey v. Walsh*, 8 Cow. 243. So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner: *Root v. French*, 13 Wend. 572. See, also, *McCarty v. Vickery*, 12 Johns. 348. In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of the property, though such consent might be temporary only, obtained by fraud or mistake, and therefore revocable against such unfair first purchaser.

"2. The other class of cases in which the owner loses the right of following and reclaiming his property, is, where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner 'has given the external *indicia* of the right of disposing of his property.' Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell, so conferred, whether real or apparent, is good against him who gave it. Thus, the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the *bona fide* holder of the bill, indorsed by the consignee, is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose indorsement he holds, has no right to the goods as against the former owner. If such goods were not paid for, they might be stopped *in transitu* by the owner, unless his consignee has already assigned his bill of lading; but that assignment divests the owner of his right of stoppage against such assignee."

The question in cases belonging to both these classes is: Has the real owner intentionally conferred on the vendor the apparent ownership or right of selling? If he has, the purchaser is protected, otherwise not. Thus, where the owner of bank stock has conferred the apparent right on another, a *bona fide* purchaser from the latter will be protected: *Crocker v. Crocker*, 31 N. Y. 507. So, where the owner permitted another to take out a license for a cart, as owner, it was held that a purchaser from the latter, without notice, would get title: *McCauley v. Brown*, 2 Daly, 428. But the vendor's apparent ownership will not protect a purchaser who has notice of a better title: *Porter v. Parks*, 40 N. Y. 564. Mere possession is not sufficient evidence of owner

ship or authority to sell to protect a purchaser from the possessor: *Covill v. Hill*, 4 Den. 323; *Linnen v. Cruger*, 40 Barb. 633; *Wilson v. Nason*, 4 Bos. 155; *Case v. Jennings*, 17 Tex. 661. One who has fraudulently obtained a bill of lading of goods, without the consent of the owner, can not confer a good title on a *bona fide* purchaser of such goods under the bill of lading, for in this case the intention to clothe the vendor with the apparent ownership is wanting: *Saltus v. Everett*, 20 Wend. 267; *Decan v. Shipper*, 35 Pa. St. 239; *Dows v. Perrin*, 16 N. Y. 325. See, on this point, the note to *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. (7th Am. ed. 1191), *et seq.*

BONA FIDE PURCHASER FROM FRAUDULENT PURCHASER.—It is perfectly well settled in accordance with the doctrine laid down by Mr. Senator Verplanck, in the opinion quoted above, that where the owner of goods voluntarily sells and delivers them to a fraudulent purchaser who does not intend to pay for them, or who pays for them with stolen property or with forged notes, or who fails to give security as promised, or who is guilty of any other fraud, vitiating the sale as to him, and enabling the vendor to reclaim the goods, yet if before the vendor has rescinded such sale the vendee sells or pledges the goods for a valuable consideration to a *bona fide* purchaser or pledgee without notice of the fraud, the latter will get a good title against the original owner: *Rowley v. Bigelow*, 23 Am. Dec. 607; *Durell v. Haley*, 19 Id. 444; *Miles v. Oden*, Id. 177; *Williamson v. Russell*, 39 Conn. 406; *Mears v. Waples*, 3 Houst. (Del.) 581; *Kern v. Thurber*, 57 Ga. 172; *Brundage v. Camp*, 21 Ill. 330; *Fawcett v. Osborn*, 32 Id. 411; *Jennings v. Gage*, 13 Id. 614; *Chicago Dock Co. v. Foster*, 48 Id. 507; *Bell v. Cafferty*, 21 Ind. 411; *Gibson v. Moore*, 7 B. Mon. 92; *Wood v. Yeatman*, 15 Id. 270; *Ditson v. Randall*, 33 Mo. 202; *Tilcomb v. Wood*, 38 Id. 561; *Hoffman v. Noble*, 6 Metc. 68; *Dows v. Rush*, 28 Barb. 157; *Dows v. Greene*, 32 Id. 490; *Western Transportation Co. v. Marshall*, 37 Id. 509; *Mowrey v. Walsh*, 8 Cow. 238; *Craig v. Marsh*, 2 Daly, 61; *Danforth v. Dart*, 4 Duer, 101; *Beavers v. Lane*, 6 Id. 232; *Lewis v. Palmer*, Hill & Denio, 68; *Barnard v. Campbell*, 58 N. Y. 73; S. C., 17 Am. Rep. 208; *Root v. French*, 13 Wend. 570; *Thompson v. Lee*, 3 Watts & S. 479; *Sinclair v. Neely*, 40 Pa. St. 417; *Arendale v. Morgan*, 5 Sneed, 703; *Hawkins v. Davis*, 5 Baxter (Tenn.), 698; *Williams v. Given*, 6 Gratt. 268; *Shufeldt v. Pease*, 16 Wis. 659; Benj. on Sales, sec. 433, note (i), (2 Am. ed.)

This doctrine is questioned by Mr. Justice Cowen in *Ash v. Putnam*, 1 Hill, 303, who declares that *Mowrey v. Walsh*, 8 Cow. 238, the leading case in New York on this point, "is an anomaly." The subsequent purchase must be strictly *bona fide* and without notice, or the purchaser will not be protected: *Rateau v. Bernard*, 3 Blatch. 244. If the purchaser has sufficient notice to put him on inquiry, he will not be deemed a *bona fide* purchaser: *Barnard v. Campbell*, 58 N. Y. 73; S. C., 17 Am. Rep. 208. In *Shufeldt v. Pease*, 16 Wis. 659, it is decided that one who takes goods from a fraudulent purchaser in satisfaction of a pre-existing debt, in good faith and without notice, is a *bona fide* purchaser, but the contrary is held in *Root v. French*, 13 Wend. 570, and *Barnard v. Campbell*, 58 N. Y. 73; S. C., 17 Am. Rep. 208. So in *Rison v. Knapp*, 1 Dill. 186, 201; *McLeod v. National Bank*, 42 Miss. 99. See on this point, with respect to *bona fide* holders of negotiable paper, the note to *Bay v. Coddington*, 9 Am. Dec. 272. A sheriff selling property on execution against a fraudulent purchaser was held, in *Ash v. Putnam*, Hill, 302, to be liable in trespass to the owner, though he had no notice of the fraud, and the sale was made to *bona fide* purchasers. In *Coles v. Clark*, 3 Cush. 399, an auctioneer disposing of goods for a mortgagor who, by

and fraudulent representations, had obtained the right to retain possession, was held liable to the mortgagee, though he had no knowledge of the mortgage, did not participate in the fraud, and had paid over the proceeds. Assignees of a fraudulent purchaser of goods, in trust for creditors, are not *bona fide* purchasers within the meaning of the rule now under consideration: *Farley v. Lincoln*, 51 N. H. 577; S. C., 12 Am. Rep. 182; *Joslin v. Cowee*, 60 Barb. 48. Nor are attaching creditors of the fraudulent purchaser: *Buffington v. Gerrish*, 8 Am. Dec. 97; *Field v. Stearns*, 42 Vt. 106; *Jordan v. Parker*, 56 Me. 557. The *bona fide* purchaser from a fraudulent purchaser will not be protected unless the latter has obtained possession: *Barnard v. Campbell*, 65 Barb. 287; nor if the fraudulent purchaser has got possession wrongfully and without the owner's consent: *Dean v. Yates*, 22 Ohio St. 388. In *Deatly v. Murphy*, 3 A. K. Marsh. 472, and *Watson v. Wilson*, 2 Dana, 406, it is decided that one purchasing from a fraudulent purchaser without actual notice of the fraud, but after a suit has been commenced to vacate the fraudulent sale, gets no title. A *bona fide* purchaser of a wife's personalty from her husband, who had married her by fraud, he having another wife living, was held to obtain a good title, in *Depew v. Robards*, 17 Mo. 580.

Unless the owner intentionally sells and delivers the property to the fraudulent purchaser, a *bona fide* purchaser from the latter gets no title. Hence, where one fraudulently represented himself to be the agent of a party, and purchased certain goods and procured them to be consigned to such party, and then got them into his own possession, and sold to a *bona fide* purchaser, it was determined that no title passed, because the owner did not voluntarily sell or deliver the goods to the fraudulent purchaser: *Darker v. Dinmore*, 72 Pa. St. 427; S. C., 13 Am. Rep. 697; *Higsons v. Burton*, 26 L. J. Ex. 342. So where one fraudulently represented himself to be a member of a certain firm, and procured goods to be sent to them, which he afterwards got into his possession and sold: *Moody v. Blake*, 117 Mass. 23; S. C., 19 Am. Rep. 394. So where one got possession of goods by falsely pretending to be another person, and then sold to a *bona fide* purchaser: *Lindsay v. Cundy*, 47 L. J. Q. B. 481. In *Andrew v. Dieterich*, 14 Wend. 31, it was decided, that the obtaining of goods by false pretenses being a felony, the owner could reclaim such goods even in the hands of a *bona fide* purchaser. But *Keyser v. Harbeck*, 3 Duer, 373, holds otherwise. In *Cochran v. Stewart*, 21 Minn. 435, a *bona fide* purchaser from a fraudulent purchaser of a certain chose in action was held to obtain a good title, though the alleged fraud was a felony by statute.

That a *bona fide* purchaser from a fraudulent grantee will be protected, see *Somes v. Brewer*, 13 Am. Dec. 406, and note; *Jackson v. McChesney*, 17 Id. 524, and note; *Coleman v. Cocke*, 18 Id. 757; *Bligh's Heirs v. Tobin*, Id. 219.

PURCHASER FROM VENDEE IN POSSESSION BEFORE PAYMENT.—It is held in *Young v. Bradley*, 68 Ill. 553, and *Schweitzer v. Tracy*, 76 Id. 345, that delivery of possession by an unpaid vendor passes the property to the vendee, so as to protect an innocent purchaser from the latter, irrespective of the contract or intention of the parties to the original sale. So, in *Goodwin v. Boston etc. R. R. Co.*, 111 Mass. 487, it is decided that where a vendor sells for cash and delivers possession, an honest purchaser from the vendee will be protected, notwithstanding a usage to allow ten days to make payment. In *Beavers v. Lane*, 6 Duer, 232, it is held that where there is a condition in a contract of sale that there shall be immediate payment, and the property is delivered, a *bona fide* purchaser from the vendee, without notice of the con-

dition, and that payment has not been made, gets a good title, but not where he has received no part of the goods and paid no part of the price. The general rule is that where a sale is conditional, it being stipulated that payment is to be made at a future day, and that until it is made the title is to remain in the vendor, although possession is delivered immediately, a *bona fide* purchaser from the vendee, without notice of the condition before payment is made, gets no title as against the original owner, if the latter has been guilty of no laches: *Benj. on Sales* (2 Am. ed.), sec. 320, and note; *Barrett v. Pritchard*, 13 Am. Dec. 449, and note; *Bailey v. Harris*, 8 Iowa, 331; *Robinson v. Chapline*, 9 Id. 91; *Baker v. Hall*, 15 Id. 277; *Bradeen v. Brooks*, 22 Me. 463; *Coggill v. Hartford etc. R. R. Co.*, 3 Gray, 545; *Ketchum v. Brennan*, 53 Miss. 596; *Parmelee v. Catherwood*, 36 Mo. 479; *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 Id. 500; *Comer v. Cunningham*, 77 Id. 391; S. C., 33 Am. Rep. 626; *Aultman v. Mallory*, 5 Neb. 178; S. C., 25 Am. Rep. 478; *Sanders v. Keber*, 28 Ohio St. 630; *Gray v. Stevens*, 28 Vt. 1. In a number of cases, however, a *bona fide* purchaser from such a conditional vendee has been held to obtain a good title as against the original owner: *Wait v. Green*, 62 Barb. 241; S. C., 36 N. Y. 556; *Steelyards v. Singer*, 2 Hilt. 96; *Ravols v. Deshler*, 4 Abb. App. Dec. 12, affirming S. C., 28 How. Pr. 66. See *Vincent v. Cornell*, 23 Am. Dec. 683. Where a purchaser is intrusted with the evidence of title to goods, with a verbal agreement that they are not to be shipped until fully paid for, and is enabled to pledge the goods and obtain an advance of their value from one who has no notice of the agreement, it is held, in *Western Union R. R. Co. v. Wagner*, 65 Ill. 197, that the latter will hold against the original vendor.

RONA FIDE PURCHASER FROM VENDOR IN POSSESSION.—Where a purchaser of goods permits his vendor to remain in possession, a subsequent *bona fide* purchaser from such vendor, without notice of the original sale, being put in possession, obtains a good title as against the prior purchaser: *Cullom v. Guillot*, 18 La. An. 608; *Shaw v. Levy*, 17 Serg. & R. 99. So a *bona fide* purchaser from one who has made a previous conveyance in fraud of creditors, will be protected: *Newson v. Lycan*, 20 Am. Dec. 156; *Wilson v. Fuller*, 9 Kan. 176.

SALES AND PLEDGES BY BAILEES AND AGENTS.—Where the owner of goods intrusts an agent with the evidence of authority to dispose of them, and thereby enables him to sell to a *bona fide* purchaser, it is obvious that he is bound by such a sale: *Nixon v. Brown*, 57 N. H. 34; S. C., 4 Am. Law Times, N. S. 187. A sale in the usual course of business by a broker, factor, or commission merchant, in excess of instructions, says *Savage, C. J.*, in *Arnold v. Hallenbake*, 5 Wend. 34, gives a good title to a *bona fide* purchaser, because the nature of the employment of such a person imports a power of sale; but not so where such an agent or bailee pledges the goods. A purchaser from a commission merchant, *bona fide*, gets a good title, notwithstanding a previous sale by the principal, of which the commission merchant had no notice: *Jones v. Hodgkins*, 61 Me. 480. Where goods are pledged as security for a loan, the pawnee or mortgagee may sell and give a good title against the original owner, if such loan is not paid, the power of sale being incident to the nature of such a pledge: *Benj. on Sales*, sec. 16; *Pothonier v. Dawson*, Holt N. P. 383; *Lockwood v. Ewer*, 9 Mod. 278; *Pigot v. Cubby*, 15 Com. B., N. S. 701; S. C., 33 L. J. O. P. 134; *Tucker v. Wilson*, 1 P. Wms. 261. But not where the sale is made before the expiration of the time allowed for redemption: *Johnson v. Stear*, 15 Com. B., N. S. 330; S. C., 33 L. J. O. P. 130. Purchasers from factors, consignees, etc., in Eng.

land are protected by the "factors' act:" Stat. Geo. IV., c. 94, sec. 2; and 5 and 6 Vict. c. 39; and there are similar statutes in many of the states: Benj. on Sales, sec. 19, and note. The general rule is that a purchaser in good faith from an agent or bailee who has no authority to sell, gets no title: *Loerschman v. Machin*, 2 Stark. 312; *Wilkinson v. King*, 2 Camp. 335; *Cooper v. Willomatt*, 1 Man., Gr. & S. 671; S. C., 5 Eng. Com. L. 670; *Metcalf v. Lumsden*, 1 Car. & K. 309; *Chism v. Woods*, 3 Am. Dec. 740; *Kitchell v. Vanadar*, 12 Id. 249; *Fawcett v. Osborn*, 32 Ill. 411; *Burton v. Curyea*, 40 Id. 320; *Parsons v. Webb*, 8 Greenl. 38; *Galvin v. Bacon*, 11 Ma. 28; S. C., ante, 258; *Covill v. Hill*, 4 Den. 323; *Linnen v. Cruger*, 40 Barb. 633; *Wilson v. Nason*, 4 Bos. 155; *Wooster v. Sherwood*, 25 N. Y. 278; *Roland v. Gundy*, 5 Ohio, 202; *Thomas v. Hess*, cited in *Easton v. Worthington*, 5 Serg. & R. 130; *Chamberlain v. Smith*, 44 Pa. St. 431; *Carmichael v. Buck*, 10 Rich. S. C. 332; *Heacock v. Walker*, 1 Tyler, 338; *Riford v. Montgomery*, 7 Vt. 411. Nor can a pledgee of such agent or bailee hold against the real owner: *Nickerson v. Darrou*, 5 Allen, 419; *Stanley v. Gaylord*, 1 Cush. 536. So as to a pledgee of a factor or consignee, for a power to sell does not, in such a case, include a power to pledge: *Bott v. McCoy*, 20 Ala. 578; *Michigan State Bank v. Gardner*, 15 Gray, 362. See *Bowie v. Napier*, 10 Am. Dec. 641, on the subject of a factor's power to pledge for his own debt.

MASTER OF A SHIP MAY SELL THE GOODS OF SHIPPERS in case of absolute necessity, as where it is impossible to carry them on, or to communicate with the owners, or where it is necessary to make repairs; and such a sale will transfer the property to the purchaser, the master being regarded as the agent of the owner of the goods, intrusted by law with a power of sale: Benj. on Sales, sec. 18; *The Gratitude*, 3 Rob. Adm. 240, 259; *Vlierboom v. Chapman*, 13 Me. & W. 230, 239; *Cammell v. Sewell*, 5 Hurlst. & N. 728; S. C., 29 L. J. Ex. 350; *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Pope v. Nickerson*, 3 Id. 500; *The Ship Packet*, 3 Mason, 255; *Fontaine v. Columbian Ins. Co.*, 9 Johns. 30; *Stillman v. Hurd*, 10 Tex. 109; *Gates v. Thompson*, 57 Me. 442. But the necessity must be absolute or no title will pass, although the master acts *bona fide*: *Freeman v. East India Co.*, 5 Barn. & Ald. 617; *Cannon v. Meaburn*, 1 Bing. 243; *Tronson v. Dent*, 8 Moore P. C. 419; *The Joshua Barker*, Abh. Adm. 215; *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Bryant v. Commonwealth Ins. Co.*, 13 Id. 543; *American Ins. Co. v. Center*, 4 Wend. 45; *Stillman v. Hurd*, 10 Tex. 109; *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387.

THE PRINCIPAL CASE IS CITED to the point that one disposing of another's property is liable to the owner therefor, in *Anderson v. Nicholas*, 5 Bos. 130; *Boyce v. Brockway*, 31 N. Y. 493; *Sprights v. Hawley*, 39 Id. 447; *Dudley v. Hawley*, 40 Barb. 397; *Hills v. Snell*, 104 Mass. 177. That where goods are stolen or taken by a trespass, or by a fraud amounting to a felony, a *bona fide* purchaser of them gets no title: *Everett v. Saltus*, 15 Wend. 478; *Chapin v. Potter*, 1 Hilt. 375; *Robinson v. Dauchy*, 3 Barb. 30; *Rockwell v. Saunders*, 19 Id. 482. That a purchaser is liable to the owner for a conversion after disposing of the goods: *Hoffman v. Carow*, 20 Wend. 22; S. C., 22 Id. 295, per Senator Edwards. As to what constitutes a conversion generally: *Cobb v. Dowe*, 9 Barb. 243.

DELANO v. BLAKE.

[11 WENDELL, 85.]

INFANT HAVING ACCEPTED A NOTE on a third person for labor performed, can not recover for the value of such labor without showing a disaffirmance of the contract by returning the note.

KEEPING SUCH NOTE EIGHT MONTHS after coming of age, and not offering to return it until the maker has become insolvent, is, in legal judgment, an affirmance of the contract.

ASSUMPSIT for work, labor, and services. It appeared that when the services were performed, the plaintiff was an infant, working under an agreement that he was to take his pay partly in goods and partly in a note of the defendant's brother. The note was accordingly given, dated June 1, 1828, the defendant indorsing it without recourse. The plaintiff attained his majority May 10, 1830. In January, 1831, the maker of the note became insolvent, having been good for the amount until that time. Shortly afterwards the plaintiff tendered the note to the defendant, and demanded payment for his work. The judge instructed the jury that if the plaintiff did not offer to return the note within a reasonable time after coming of age, the contract must be deemed ratified, and they should find for the defendant, to which the plaintiff excepted. Verdict for the defendant. Motion for a new trial.

O. B. Matteson, for the plaintiff.

Mann and Wager, for the defendant.

By Court, NELSON, J. In *Goodsell v. Myers*, 3 Wend. 479, it was decided that though the note of an infant was not void, and only voidable, yet that to charge a party upon a note during infancy, there must be an express promise to the party in interest, or his agent, or such an admission of an existing liability after the infant arrived of age, that a promise might be inferred. In that case, the party seeking to enforce the note was required to show affirmatively a confirmation of the voidable act. There the infant stood on the defensive. Here he is the actor, and is bound to show a disaffirmance of the contract, by returning the note, before he can call upon the defendant for payment for the work done, in satisfaction of which the note was received during infancy. It may be questionable whether, within the principle of the case of *McCoy v. Huffman*, 8 Wend. 84,¹ the plaintiff can recover at all for the work and labor performed by him,

1. *McCoy v. Huffman*, 8 Cow. 84.

it having been performed under a special agreement, which has been executed. We do not, however, put the case upon that ground. The purchase by an infant of real estate is voidable, but it vests in him the freehold until he disagrees to it, and the continuance in possession after he arrives of age is an implied confirmation of the contract. So as to a lease, the continuance in possession under it after the party arrives of age is a confirmation, and he must pay the rent: *Bac. Abr.*, tit. *Infant*, pp. 611, 612. We do not say that the retaining of the note, in this case, affords as strong an inference in favor of a ratification of the contract as the continuance of the possession of real estate, but the principle must be the same. After the plaintiff came of age, every inference in relation to the note should be drawn against him, the same as against any other adult. The holding of the note by the plaintiff eight months after he arrived of age, before he offered to return it to the defendant, is, in judgment of law, a ratification of the contract, especially where, in the mean time, the maker of the note has become insolvent, the debt lost, and the offer to return made on the heel of that event: 2 *Kent Com.* 237, 238.

New trial denied.

RATIFICATION OF INFANTS' CONTRACTS.—The decisions in this series on this subject are collected in the notes to *Benham v. Bishop*, 23 *Am. Dec.* 358, and *Lawson v. Lovejoy*, *Id.* 526.

PROMISSORY NOTES OF INFANTS are not void, but voidable, and may be affirmed on coming of age: *Taft v. Sergeant*, 18 *Barb.* 321, 322, citing the principal case. It is cited also in *Jones v. Phoenix Bank*, 8 *N. Y.* 235, and *Hastings v. Dollarhide*, 24 *Cal.* 211, 215, to the point that where an infant retains a note made to him, for an unreasonable time after coming of age, he shall be deemed to have ratified it.

CONTRACTS OF INFANTS ARE GENERALLY VOIDABLE, and not void: *Henry v. Root*, 8 *N. Y.* 543, citing the principal case. Where a contract is ratified by an infant on coming of age, it is held in *Hodges v. Hunt*, 22 *Barb.* 151, referring to *Delano v. Blake* as authority, that the new promise must be a complete agreement of which the old debt is the consideration.

MATTER OF ALBANY STREET.

[11 *WENDELL*, 149.]

QUESTION OF THE NECESSITY OF EXTENDING A STREET in the city of New York can not be raised on a motion to confirm the report of the commissioners of assessment.

WHERE ONLY PART OF A LOT IS REQUIRED FOR OPENING A STREET, the legislature can not constitutionally authorize the appropriation and sale of the residue without the owner's consent.

DAMAGE TO THE OWNER OF PROPERTY BY (estimated according to the present value considering the extent of his interest in it. WHERE PART OF A CEMETERY IS TAKEN FOR A praised according to its value as building l DAMAGE TO THE PROPERTY TAKEN AND THE B should be estimated according to the same WHERE PROPERTY CAN NOT BE BENEFITED TO MENT upon it for opening a street, the rep be sent back, until it is so found or the pr

MOTION for the confirmation of the of estimate and assessment concerning street in New York city, to which it v Trinity church: 1. That the extension yard was not a public necessity. 2. proposed to take more than was rec, behalf of other objectors it was claimed sioners estimated the part of Trinity street as building lots, while as to the timated the benefit to it only as a ce assessments on the other objectors exce of their property.

R. Emmet, for the motion.

H. Bleecker, *contra*.

By Court, SAVAGE, C. J. As to Trinity church: The question presents us. The application now, is for the made by the commissioners. The co or act upon the question of the ne proposed improvement. The corpor tion before they apply to this court f missioners. If the decision of the c can be reviewed at all by this court this motion. The powers given by whenever the mayor, aldermen, and New York shall be desirous to open lawful for them to cause the same to that may be required for the purpose be taken for that purpose, and compe of 1813, 408, sec. 177.

As to the second point made by have undertaken to confer power take more land than is necessary fo

in this respect are subject to review upon this motion. By the one hundred and seventy-ninth section, 2 Rev. Laws, 416, it is enacted that in all cases where part only of any lot or parcel of land shall be required, if the commissioners deem it expedient to include the whole lot in the assessment, they shall have power so to do; and the part not wanted for the particular street or improvement shall, upon the confirmation of the report, become vested in the corporation, who may appropriate the same to public uses, or sell the same, in case of no such appropriation. If this provision was intended merely to give to the corporation capacity to take property under such circumstances, with the consent of the owner, and then to dispose of the same, there can be no objection to it; but if it is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess.

The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of another. It is in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and can not be supported. This power has been supposed to be convenient, when the greater part of a lot is taken, and only a small part left, not required for public use, and that small part of but little value in the hands of the owner. In such case the corporation have been supposed best qualified to take and dispose of such parcels, or gores, as they have sometimes been called; and probably this assumption of power has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received the deliberate sanction of this court. Suppose a case where only a few feet or even inches are wanted from one end of a lot to widen a street, and a valuable building stands upon the other end of such lot, would the power be conceded to exist to take the whole lot, whether the owner consented or not? Or suppose the commissioners had deemed it expedient and proper, in this case, in the language of the statute, to take the whole of the church-yard, the act would have been equally within the letter of the statute with their act in the present case, and yet no one would suppose that the legislature ever intended to confer such a power. The quantity of the residue of any lot can

not vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legislature thus to dispose of private property, whether feet or acres are the subject of this assumed power. I am clearly of opinion that the commissioners have no right to take the strip of land in question against the consent of the corporation of Trinity church.

The objections taken in behalf of the other objectors are also serious obstacles to the confirmation of this report. The whole of the ground taken for the street, and the part not taken, but assessed for benefit, is a cemetery, and can not be used for any other purpose by the church; for such a purpose each rod of ground is of equal value. Why is it, then, that the part taken is considered of more value to the church than the part which has been assessed for benefit? If it be answered that the part taken is no longer to be used as a cemetery, but for secular purposes, and therefore much more valuable, I answer, that it has not now that additional value, and can not have it while it remains the property of the church; and it is the damage sustained by the church which the commissioners are to ascertain. If the property in question ever acquire such enhanced value, it will be in consequence of this proceeding and of the street's being hereafter closed; upon no other contingency can this ground ever be used for building lots. Can it be right, then, to consider it now as building lots, and assess its value as such to the church as damage? If the whole churchyard was building ground, one half of the expense of opening a street through it would be assessed upon the church, because its property has a front the whole length of the new street; but as it can not be used for such a purpose, the property of the church is not enhanced in value as it would be under different circumstances, if it is enhanced at all. It seems to me, the true rule of estimating the damage is to appraise the
✓ property at its present value to the owner, considering the extent of the interest which the owner has, and the qualified rights which may be exercised over it. If the church holds the absolute interest in the church-yard, and may, if they choose, convert it all into building lots, then the rule adopted by the commissioners in their assessment for damage is correct; but then they should apply the same rule in their assessment for benefit. If, on the other hand, the church, as I suppose, can not use the church-yard for any purpose but for burying the dead, then a different rule should be adopted, both as to

damage and benefit; but clearly the same rule should be adopted for both assessments, whether for damage or benefit.

The next and last ground of objection is, that the assessments upon the adjacent property are too large. Such seems to be the balance of evidence; and when property is not, and can not be benefited to the extent of the amount assessed upon it, it is the duty of this court to send back the report until property can be found sufficiently benefited to defray the expense, or until the proceedings shall be discontinued.

EMINENT DOMAIN.—As to what uses are public so as to authorize the exercise of the power of eminent domain, see the note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 686. For decisions as to other requisites for the valid exercise of this power, see *Livingston v. Mayor etc. of New York*, 22 Am. Dec. 622; *Aldridge v. Tusculum etc. R. R. Co.*, 23 Id. 307; *Scudder v. Trenton Delaware Falls Co.*, Id. 756; *Cooper v. Williams*, 24 Id. 299; and the notes thereto. The principal case is cited to various points connected with this subject as follows: That private property can not be taken for private use without the owner's consent: *Bankhead v. Brown*, 25 Iowa, 545; *Parham v. Justices*, 9 Ga. 354; *Coster v. Tide Water Co.*, 8 N. J. Eq. 64; *Taylor v. Porter*, 4 Hill, 146; *Embury v. Conner*, 2 Sandf. 107; S. C., 3 N. Y. 516; *People v. White*, 11 Barb. 31; *Bennett v. Boyle*, 40 Id. 555; *People v. Commissioners*, 53 Id. 75; *Varick v. Smith*, 5 Paige Ch. 159; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 345; *Witham v. Osburn*, 4 Ora. 323; S. C., 18 Am. Rep. 257. That the legislature can not take property by the mere exercise of legislative power: *White v. White*, 5 Barb. 482. That where property is taken for public use, no more than is necessary can be taken: *Kane v. Mayor etc. of Baltimore*, 15 Md. 250; *Bradshaw v. Omaha*, 1 Neb. 31; *League Island, Matter of*, 1 Brewst. 526. That land taken for a street is considered as taken for public use: *People v. Kerr*, 37 Barb. 397. As to what constitutes a public necessity for the taking of property: *Prather v. Jeffersonville etc. R. R. Co.*, 52 Ind. 37. As holding merely that the legislature can not take property admitted not to be necessary for public use, and not that the court may decide the question of necessity against the legislature: *Water Works Co. v. Burkhart*, 41 Ind. 370. That the same means of redress exist against the government and its officials as against private individuals, where property not necessary for the public use is taken: *Trombley v. Humphrey*, 23 Mich. 475. That the court, under the New York statute, had no power, on the coming in of the report of the commissioners of assessment in a street case, to reject it on the ground that there was no necessity for the taking of the property, or that the improvement was not needed: *Washington Park, Matter of Commissioners of*, 56 N. Y. 152. That in assessing the expenses of opening a street or other public improvement, no property can be assessed beyond the value of the benefit conferred by the improvement: *Creighton v. Manson*, 27 Cal. 624; *Tide Water Co. v. Coster*, 18 N. J. Eq. 529, 530; *People v. Mayor etc. of Brooklyn*, 6 Barb. 224; *Flaibush Avenue, Matter of*, 1 Id. 293; *People v. Mayor*, 63 N. Y. 299. That the same standard of valuation must be adopted in assessing both the damages and the benefits of a public improvement: *McIntire v. State*, 5 Blackf. 388. As to the proper mode of valuation where part of a lot is taken for a street: *Mayor etc. of Baltimore v. Clunes*, 23 Md. 465; and generally as to the proper mode of assessing the value of property and the benefit of an improvement: *State v.*

Mayor etc. of Newark, 33 N. J. L. 100, 101; *Muter v. Mayor etc. of Newark*, Id. 463; *De Graw Street, Matter of*, 18 Wend. 570. That the property of a corporation is under the same protection as that of an individual: *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. An. 521. The case is cited also in *Bridgeport v. New York etc. R. R. Co.*, 36 Conn. 365; *John Street, Matter of*, 19 Wend. 667; *William and Anthony Streets*, Id. 691; *New York etc. R. R. Co. v. Van Horn*, 57 N. Y. 477; *People v. Law*, 34 Barb. 500; S. C., 4 How. Pr. 109; S. C., 22 Id. 115; *Anderson v. Turberville*, 6 Coldw. 163; *Reynolds v. Baker*, Id. 229.

CASES
IN THE
COURT OF ERRORS
OF
NEW YORK.

GROVER *v.* WAKEMAN.

[11 WENDELL, 187.]

INSOLVENT DEBTOR MAY PREFER CREDITORS in making an assignment, if such assignment is absolute and unconditional, devoting his whole property to the payment of his debts, and reserving no benefit to himself.

PROVISION IN AN ASSIGNMENT REQUIRING CERTAIN CREDITORS TO RELEASE their claims, as a condition and consideration of receiving a preference, renders the assignment absolutely void.

APPEAL from a decree of the court of chancery setting aside as fraudulent and void a voluntary assignment made by Grover and Gunn, upon a bill filed by the respondent, who was one of their creditors. The answers denied that the assignment was fraudulent in law or in intent. The assignment provided first for the payment of certain creditors named as class number 1, among whom were Messrs. John and Ebenezer Beach, indorsers of certain notes of one of the partners for the benefit of the firm, who were to be first paid. The remaining provisions of the assignment, so far as material, are stated in the opinions of Mr. Justice Sutherland and Mr. Senator Edmunds. The chancellor decreed the assignment to be fraudulent and void as to the complainant, and set the same aside, and directed a reference to ascertain the amount due to the complainant, and that an account be taken of the property which had come to the hands of the trustees, etc., allowing them their necessary expenses, and also all payments made to creditors of the assignors. The defendants appealed.

S. A. Talcott and B. F. Buller, for the appellants.

D. Lord, jun., and S. A. Foot, for the respondent.

whether the assignment made by Grover and Gunn, on the first day of July, 1826, is fraudulent and void upon its face, as being calculated and intended in judgment of law to delay, hinder, and defraud their creditors, in the prosecution and collection of their debts. The most important objection made to the assignment grows out of the condition attached to the payment of the creditors named in class No. 2. The assignees are directed, after discharging the debts due to class No. 1, to apportion whatever surplus may remain, among such of those named in class No. 2 as will agree in writing, under seal, to receive what may fall to them upon such apportionment, in full discharge of all their claims and demands upon the assignors. The residue of the avails, if any, are then to be applied to the payment of the debts due to the debtors in class No. 3, and of all other debts justly due and owing by the assignors, to be proven to the satisfaction of the assignees; and if any surplus shall then remain, it is to be paid over to the assignors.

It was contended by the complainant in the court below, the respondent here, that such of the creditors in No. 2 as shall refuse to come in and discharge the assignors, upon the terms there offered them, are entirely excluded from all benefit from the assignment; that if there should be a surplus after paying all the other creditors, according to the terms and spirit of the instrument, the assignees could not pay it to them, but must pay it to the assignors themselves. Upon a careful consideration of this instrument, and applying to it the ordinary rules of interpretation, I do not think that such is its necessary or just construction. The debts of the first class are first to be paid; then an apportionment is to be made among the debts of such of the second class as will accept what may then fall to them, and give absolute releases. The residue, if any, is then to be applied to the debts of class No. 3, and to all other debts, justly due and owing by the assignors. Other than what? Why, obviously, other than those for the payment of which provision had already been made. But no provision had been made for those of class No. 2, who should refuse to accept their distributive shares and give releases. They fall, therefore, in my opinion, within the terms of the residuary clause, and would be entitled to be paid under the assignment, if the fund should be sufficient for that purpose.

A fraudulent intent is never to be presumed; and where instrument is ambiguous in its terms, and admits of two c

structions, that interpretation should be given to it which will render it legal and operative, rather than that which will render it illegal and void. It was supposed that the provision that these residuary debts should be proven to the satisfaction of the assignees, tended to show that none of those enumerated in class No. 2. could have been intended to be covered by the residuary clause, because the assignors had, on the face of the assignment, admitted those to be valid and existing debts; and, of course, if those were the debts intended to be covered, they would not have imposed on their assignees the useless duty of exacting and receiving proof in relation to them. This suggestion is susceptible of two answers. In the first place, there may have been many other debts not enumerated, and in relation to which it would have been necessary and proper to require proof; and in a provision of this description, a party would naturally employ general and comprehensive terms, although they might embrace some cases in relation to which the provision was superfluous. But, secondly, upon adverting to the schedule which contains class No. 2, it will be perceived that many of the debts there enumerated are stated by estimation only. Of the thirty-four thousand dollars embraced in that class, more than one fourth, or about nine thousand dollars, are debts of that description. In relation to them, it was proper and necessary to exact proof, as there was no liquidation or admission of their amount; and in relation to those that were specifically stated in the schedule, the schedule itself would probably be sufficient evidence to justify the assignees in receiving them. I entertain no doubt, therefore, that under this assignment, such of the creditors of the second class as should refuse to accept their shares of the property assigned in full satisfaction and discharge of their debts, were not absolutely excluded from the benefit of the assignment, but only postponed to a subsequent class.

Having thus settled the character and construction of the assignment, the question recurs, whether it is void on account of the condition on which it makes the preference given to the creditors of the second class to depend, to wit, an absolute discharge of their debts. It is perfectly settled, both in England and in this country, that a debtor in failing circumstances has a right to prefer one creditor, or set of creditors, to another, in all cases not affected by the operation of a bankrupt system. He may assign the whole of his property for the benefit of a single creditor, in exclusion of all others; or he may distribute

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it in unequal proportions, either among a part or the whole of his creditors. No matter how, or upon what principles, the distribution is made, if the debtor devotes the whole of his property to the payment of just debts, neither law nor equity inquires whether the objects of his preference are more or less meritorious than those for whom he has made no provision: 3 Mau. & Sel. 371; 4 Mason, 210; 5 T. R. 235; 6 Id. 152; 8 Id. 521; 4 East, 1; 2 P. Wms. 427; 1 Atk. 95, 154; 2 Johns. Ch. 283; 3 Johns. 71; 5 Id. 385; 1 Binn. 502; 10 Mod. 489; 5 T. R. 424; 15 Johns. 583; 5 Cow. 547.

The right to prefer may originally have been sustained in part upon the supposition that just and proper grounds of preference did in most cases exist, and would be duly regarded by the debtor; but whatever may have been the reason or foundation of the rule, it is one of that numerous class of cases in which the rule has become absolute, without any regard to the fact whether the reason on which it was founded exists or not in the particular cases. It is now too late to agitate the question, whether those assignments, either partial or general, are sustained by considerations of true wisdom and policy. Reflecting men have differed upon that subject; but the better opinion seems to be, that in the absence of a general bankrupt system, the interests of a commercial community require that they should be sustained. They have accordingly grown into use, and have been sanctioned by judicial decisions in most of the states of the Union. They have become thoroughly incorporated into our system; and all that it is now competent for our courts to do, is to see that they fairly appropriate all the insolvent's property, or such portion of it as he undertakes to assign, to the payment of his just debts, and are not made the instruments of placing it beyond the reach of his creditors, and for the benefit, either immediate or remote, of the insolvent himself. Whenever they depart from the simplicity of a direct and unequivocal devotion of the property of the assignor to the payment of his debts, and contain reservations and conditions intended for his ease and advantage, they are viewed with considerable, and I think I may add, in view of the course of judicial decisions in this state, with increasing distrust.

The precise question now presented to us has never been decided in this state. In *Hyslop v. Clarke*, 14 Johns. 458; *Austin v. Bell*, 20 Id. 442 [11 Am. Dec. 297]; and *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329, it arose in connection with other circumstances which had more or less influence in the decision

those causes. *Hyslop v. Clarke* was an action of trespass brought by the assignees of Barnet and Henry against a judgment creditor of the assignors, who had caused an execution to be levied upon their property, notwithstanding the assignment. The plaintiff claimed the property under the assignment, and the defendants contended that the assignment was void, and did not pass the property out of the assignors. The trusts declared in that case were: 1. To pay a certain debt due to the assignees. 2. To pay all the other creditors of the assignors in full, if the property should be sufficient; if not, then ratably, provided they should severally and respectively discharge the assignors from all further liability for their debts; but if the creditors, or any of them, should refuse to give such discharge, then the second trust was to become void, and the trustees were directed not to execute it. They were then, thirdly, after paying the debt of Hyslop & Co., the assignees, to hold the residue in trust to pay the whole of the avails to such of the creditors of the assignors as they should appoint, as soon as such refusal should be known to them; and, 4. To pay the residue to the assignors. Here, as was remarked by Judge Van Ness, the assignment did not actually give a preference to any of the creditors except Hyslop & Co.; but it was an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preference at a future time, upon their own terms and conditions. The trust for the benefit of all the creditors ceased whenever any one of the creditors refused to come in on the terms prescribed, and the property was then held in trust for the assignors themselves; and as the creditors could not reach it at law, if the assignment was valid, so Judge Van Ness held that they could not effectually reach it in equity. For if any one should file a bill to compel the assignors to make a new declaration of trust, as the power reserved was to select whom they pleased, if a decree should be made ordering a new declaration, the assignor might exclude the very creditor who had filed the bill. Under such circumstances, no creditor would ever file a bill.

That assignment, then, differed from the one now under consideration in two essential particulars: 1. It reserved to the grantor a right subsequently to control the property by appointing new uses; and, 2. The power of any one creditor effectually and beneficially to compel such declaration, was exceedingly doubtful, if not impossible. The weight which these circumstances had in the decision of the cause may be subsequently

considered. The case of *Murray v. Riggs*, 15 Johns. 571, shows that the control over the property which the assignor there reserved was of itself sufficient to avoid the deed. In *Austin v. Bell*, the assignment contained a reservation of two thousand dollars per annum, for a limited time, to the assignor. It also exacted from the creditors who were to be benefited by it, a general release; and then provided, that if any of the creditors named should not within a limited time become parties to the assignment, and thereby discharge the assignor, that the assignees should then pay to the assignors the proportion which would otherwise have gone to such creditors; and it was on this ground, principally, that the assignment in that case was held void. The provision for the grantors themselves was then supposed to have been sanctioned by the court in *Murray v. Riggs*; and C. J. Spencer put his opinion mainly on the ground, that by the provision of the assignment, the shares of such of the creditors as should refuse to execute it, were to revert to the grantors for their own private benefit and use. In *Seaving v. Brinkerhoff*, the assignment also contained the condition that the creditors who should come in under it should give a full discharge of their demands; and if any of them refused, their shares were to be held in trust for the grantor. Chancellor Kent laid great stress in that case upon the fact that the assignment did not embrace all the property of the assignor, and yet exacted a release from his creditors upon a partial payment; he says the condition was oppressive, and without any color of justice in this case, inasmuch as the assignment was not general of all the property, but only of a specified part; a partial assignment upon such a condition is pernicious in its tendency, if it be not fraudulent in its design; and in relation to the resulting trust, he remarked that a power of coercion over the creditor, with the reservation of such a resulting trust to the grantor in case the coercion should not be successful, was deemed by the supreme court, in *Hyslop v. Clarke*, to be a badge of fraud, and not a fair and lawful assignment.

But although it is not adjudged in any of these cases that an assignment is fraudulent and void, which merely makes the preference given to creditors to depend upon their releasing the grantor, but which at all events devotes the whole property to the payment of his debts without any reservation for his own private benefit; still it can not be contended that they sanction with anything like the authority of a judgment, a contrary doctrine. I am inclined to think that the weight of

fessional opinion in this state has been in favor of the validity of such assignments; but that so far as it depends upon our own adjudications, the question is still open, and may now be settled by this court upon principle.

Very few cases are to be found upon this subject in the English books, and whenever the question has arisen there, it has generally been upon composition deeds, to which the creditors were parties; or has been more or less affected by considerations growing out of their bankrupt system: 4 T. R. 166; 8 Id. 521. In the case, however, of *The King v. Watson*, 3 Price, 6, in the exchequer chamber, it must be conceded that the objection to the assignment which we are now considering, existed, and was urged against its validity, and that the objection was overruled; there, however, as in the other cases, the principal question was, whether the assignment was not void under the bankrupt laws. The case, however, is a very bald one, and is entitled to very little weight as authority. The opinion is exceedingly brief, and refers to no cases.

This question has several times been under the consideration of the supreme court of Massachusetts; but it has generally, if not always, been so connected with other objections to the assignment, that it is exceedingly difficult to say, upon a review of all those cases, what the judgment of that court would be upon the naked and insulated point which we are now considering: *Hutch v. Smith*, 5 Mass. 42; *Widgery v. Haskell*, 5 Id. 144 [4 Am. Dec. 41]; *Ingraham v. Geyer*, 13 Id. 146 [7 Am. Dec. 132]; *Hastings v. Baldwin*, 17 Id. 552; *Harris v. Sumner*, 2 Pick. 129. Judge Story had occasion to consider those cases in *Halsey v. Whitney*, 4 Mason, 229, which was decided in October, 1826, and the conclusion which he deduced from them was, that this precise point was not directly decreed in any of them. He observed that there were intimations in several of these cases which would justify a doubt whether the court were prepared to admit the validity of such a stipulation, while in others which contained a similar provision, no objection was taken to it by the counsel who argued them, or by the court in their judgment. His conclusion on the whole was, that the point was not judicially settled in Massachusetts. In that opinion he is sustained by Chief Justice Parker, who, in *Borden v. Sumner*, 4 Pick. 265 [16 Am. Dec. 338], which was decided in the same month with *Halsey v. Whitney*, obviously considered the question as still open, and declined expressing any definitive opinion upon the subject, as it was not necessary to the decision of the

cause then under judgment. The subsequent cases of *v. Ludlow*, 5 Pick. 28, and *Lupton v. Cutter*, 8 Id. 298, question in Massachusetts still in the same state of uncertainty. The most that can be said is, that in several of the cases, though the assignment contained this provision, the question was not taken either by the counsel or the court. Judge Story of the United States district court for the state of Maine, in the case of *G. and I. Lord, libelants, v. The Brig Watchman*, in the sixteenth number of *Amer. Jurist*, 284, in a very able and learned opinion, in which all the Massachusetts cases were referred to, also came to the conclusion that it was still an open question.

In Pennsylvania, an assignment containing a stipulation for a release was sustained in *Lippincott v. Barker*, 2 Bin. 433 [Am. Dec. 433]. Judge Breckenridge, however, dissented. Chief Justice C. J. Tilghman and Mr. Justice Yeates, whose opinion prevailed, took pains to put themselves upon the particular circumstances of the case. The chief justice observed, "It being, however, to be distinctly understood that this question is confined to the circumstances of the present case, there are many and strong objections to deeds of this kind made without the privity of creditors, and excluding them from the right to do not execute releases." *Vide also Burd v. Smith*, 4

On the other hand, the supreme court of errors of Connecticut, in *Ingraham v. Wheeler*, 6 Conn. 277, pronounced the assignment fraudulent and void, solely on the ground that the distribution of the property assigned to those creditors should give the assignor a discharge. It was the decision in the case, and was fairly met and decided by the court.

The same principle was also decided in Ohio, in *Jordan*, 5 Ham. 293 [24 Am. Dec. 281].

In *Pearpoint v. Graham*, 4 Wash. C. C. 232, Judge Ington sustained an assignment containing this condition, though the district court in Maine, in the case already referred to, had held the condition was held fraudulent. And Judge Story, in *Whitney*, 4 Mason, 230, although he came to the conclusion with obvious doubt and hesitation, that the weight of authority was in favor of the validity of an assignment with such a condition, did not hesitate to declare that if the question were entirely new, and many estates had not passed upon the validity of such assignments, the strong inclination of his mind would be against their validity. It is very clear that Judge

1. *The Watchman*, Ware, 232.

coming to the conclusion that the weight of authority lay upon that side of the question, inferred it, as Judge Ware has expressed it, not so much from the authoritative decisions of the court as from the silent acquiescence of the public; not that it had been clearly settled, or distinctly recognized by the judicial tribunals, but that it had slowly ripened into a rule of the common law of Massachusetts by usage and custom.

There being, then, such a conflict among the authorities, and so much doubt on which side the preponderance lies, it seems to be not only proper, but necessary, to consider the question with reference to the general principles involved in it. Every conveyance of property to trustees is, to a certain extent, a hindering and delaying of creditors. It interrupts and presents obstacles to their legal remedies; and every such assignment is absolutely void, if it does not appoint and declare the uses for which the property is to be held and to which it is to be applied. A provision that the uses shall be subsequently declared by the assignor, will not do; they must accompany the instrument and appear on its face, in order to rebut the conclusive presumption of a fraudulent intent, which would otherwise arise. But where the assignor parts with all control over the property, and devotes it absolutely to the benefit of his creditors, without any reservation or stipulations for his own advantage, the honesty of his intention is so apparent, and the advantage to the creditors so direct and decisive, that they can not be said to be obstructed or delayed in their remedies. But where, instead of directly distributing his property among his creditors as far as it will go, he places it beyond their reach by an assignment, not merely for the purpose of saving it from one particular creditor, to be given to another, or to be equally divided among all, but for the purpose of enabling him to extort from some or all of them an absolute discharge of their debts as the condition of receiving a partial payment, he perverts the power to a purpose which it was never intended to cover, and which the principle on which the right to give preferences is founded will not justify. Why should a debtor be permitted in this way to operate upon the fears of his creditors, and coerce them into his own terms?

It has sometimes been said, in answer to this view of the case, that there is nothing immoral or unjust in a debtor in embarrassed circumstances, and who is unable to pay all his debts, making the best arrangement in his power with his creditors, and giving the largest dividend, or the whole, to those

who will settle with him on the best terms; and if he can do this while he retains his property in his own hands, there is no reason, it is said, why he should not be permitted to do it under the cover of an assignment. Parties not under legal disabilities may make such contracts as they please, and if they are supported by a consideration, and there is no fraud in the case, they will not be disturbed. If a debtor, therefore, with his property in his own hands, and open to the legal pursuit of his creditors, can satisfy them that it is for their interest, or the interest of any of them, to accept two shillings and sixpence in the pound and give him an absolute discharge, there is no legal objection to it; they treat upon equal terms; the ordinary legal remedies of the creditor are not obstructed. But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits, by putting his property into the hands of trustees, with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all liability. It has been decided in this court, that the reservation of the least pecuniary provision for the assignor or his family, renders an assignment of this description fraudulent and void. How much more valuable is a discharge from his debts, or a portion of them, to an insolvent debtor, than a temporary pecuniary pittance. Judge Van Ness, in *Hyslop v. Clarke*, states what I consider to be the sound principle upon this subject. He says an insolvent debtor has no right to place his property in such a situation as to prevent his creditors from taking it under the process of a court of law, and to drive them into a court of equity, where they must encounter expenses and delay, unless it be under very special circumstances and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution of his estate to be made among them all. Judge Spencer, in *Austin v. Bell*, and Chancellor Kent, in *Seaving v. Brinkerhoff*, obviously concurred in the soundness of that position. Judge Story expressed his approbation of it in *Halsey v. Whitney*. The supreme court of errors in Connecticut adopted it in *Ingraham v. Wheeler*, and it was most happily and impressively amplified and illustrated by the learned judge of the United States district court for the state of Maine, in the case to which I have referred.

It is time that some plain, simple, but comprehensive principle should be adopted and settled upon this subject. In the

absence of a bankrupt law, the right of giving preferences must probably be sustained. Let the embarrassed debtor, therefore, assign his property for the benefit of whom he pleases; but let the assignment be absolute and unconditional; let it contain no reservations or conditions for the benefit of the assignor; let it not extort from the fears and apprehensions of the creditors, or any of them, an absolute discharge of their debts as the consideration for a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditor; and above all, let it not put up his favor and bounty at auction under the cover of a trust to be bestowed upon the highest bidder. After the maturest reflection upon this subject, I have come to the conclusion that the interests, both of debtor and creditor, as well as the general purposes of justice, would be promoted, if the question is still an open one, by confining these assignments to the simple and direct appropriation of the property of the debtor to the payment of his debts. The remnants of many of these insolvent estates are now wasted in litigation growing out of the complex or suspicious character of the provisions of these assignments. One device after another to cover up the property for the benefit of the assignor, or to secure to him, either directly or indirectly, some unconscientious advantage, has from time to time been brought before our courts, and received condemnation. But new shifts and devices are still resorted to, and will continue to be so, until some principle is adopted upon the subject, so plain and simple that honest debtors can not mistake it, and fraudulent ones will be deterred from its violation by the certainty of detection and defeat. The principle to which I have adverted, it appears to me, if adopted, will, to a very considerable extent, accomplish that object.

But there is another provision in this assignment which, it appears to me, it is impossible to sustain. It is that which gives to the assignee full power and liberty to compound with all or any of the creditors in such manner and upon such terms as they shall deem proper, so, however, as not to interfere with or depart from the order of preference established in the assignment. The effect of this provision is, as is stated by the chancellor, to perpetuate the right of giving preferences by vesting in the assignees an arbitrary power in relation to these several classes of creditors, and of compounding with any one upon such terms as they may think proper. I do not see how any other construction can be given to it; it has repeatedly been decided that an assignment which does not declare the uses, but

reserves to the assignor the power of subsequently do fraudulent and void; and as the assignor can not reserve power of giving preference to himself, he certainly legally confer it upon his assignee; the same objection exists in both cases.

The next and only remaining objection to the assignment which I shall consider is, that it does not fix the time which the assignees are to give notice to the creditors. No. 2, to come in and execute the discharge and receive dividend. After paying class No. 1, the assignees are to pay surplus to such of the creditors in class No. 2 as shall within three months from the time when thereunto in writing by them, agree to receive their dividend and execute a discharge. The chancellor seems to suppose that the assignees, under this provision, may give notice to one of the creditors at one time and to others at another time, and that each must come in within three months after receiving his notice. When he comes in, he must execute a discharge, although there is no certainty whether the others will be called upon, or that they have an opportunity of coming in within a reasonable time. I should incline to the opinion that it was the duty of the assignees to give notice to all the creditors at the same time.

But still, the objection remains, that the time is not limited by the assignment, but is left to their discretion, so that the creditors would have no remedy for an undue delay on the part of the assignees, except by a resort to a court of equity. This objection does not strike me with much force as it appears to have done the chancellor. Where there is nothing fraudulent or suspicious in the trust itself, and of the nature of the case, it is seen to be necessary that a latitude of discretion, in relation to it, should be given to the assignees, I am not prepared to say that the circumstance that there is no remedy for an abuse of that discretion, except by a resort to a court of equity, is sufficient to avoid the assignment to a certain extent, that may have been the fact in some cases where a matter, affecting the rights and interests of the creditors, which might and ought to have been made definite and certain, is left to the discretion of assignees, different consequences may arise; and I should incline to the opinion that it is not fraudulent. It is unnecessary, however, to dwell upon this point, as I hold the assignment fraudulent upon other grounds which have been stated.

I also abstain from any discussion of the question

the debt of the Messrs. Beach, the creditors first named in class number one, was a debt due from the firm of Grover & Gunn, or was the individual debt of one of them; and admitting it to have been an individual debt, what influence it would have upon this assignment. It is an important question which, I agree with the chancellor, ought to be settled in a case where there is no dispute about the facts.

I am for affirming the decree below.

EDMONDS, Senator. This is a contest between the creditors of Grover & Gunn; the respondent claiming under a judgment and execution, and the other creditors appearing here by the assignees and claiming under the assignment. The assignees have expended a large amount of the trust fund in the payment of the debts owing by Grover and Gunn, and in the discharge of their duties under the assignment; and the respondent asks that the assignment shall be declared fraudulent and void as to him, and that he may be paid the amount of his claim in preference to the other creditors. The decree of the chancellor confirms the assignment so far as regards the past acts of the assignees, but vacates it so far as relates to the funds yet in their hands. In the former part of the decree, I accord with the chancellor; and if he is right in the latter part thereof, the remaining fund must be paid in satisfaction of the respondent's debt, to the exclusion of the other creditors.

An equal distribution of a debtor's property among all his creditors is particularly favored by courts of equity; for it is a standing rule, that "equality is equity." This rule would seem to be violated by giving to the respondent the preference he now seeks; yet it can be justified upon a principle which pervades all our courts, to wit, that the vigilant, not the remiss and careless creditor, is entitled to their favor and protection. The respondent claims that the assignment, on which the other creditors rest for their satisfaction, is fraudulent and void, and that therefore he, as the most vigilant creditor, is now entitled to the avails of the debtor's property; and this is the whole question in the case.

Fraud has been well declared to be a question of intent; for no man can justly be said to be guilty of a fraud by accident or mistake. Our statute, 2 Rev. Stat. 137, sec. 4, has declared that the question of fraudulent intent, in all cases arising under it, shall be a question of fact, and not of law; and in order to ascertain whether this assignment is fraudulent under this statute, and void by force of its operation, we must look at the facts in

our search for the intent. The appellants in their answer equivocally deny any such fraudulent intention. This is responsive to the charge in the bill, and is conclusive upon the respondent, unless contradicted by the evidence. None was taken, and consequently there is no evidence of the intent of the actor out of the assignment and the pleadings. There is nothing in the answer inconsistent with this denial, and the assignment, which is part of it, shows that inconsistent inference, consequently, we are to deduce the fraudulent intention as an inference from the assignment itself, and only from that. It might have been argued from the decision of this court in *Seward v. Jackson*, 8 Cow. 406, and from the provisions of the revised statutes, to which I have already referred, that it is not competent for this court to draw any such inference. But, as the absence of fraudulent intention being established by the denials in the answer, we would not be at liberty to infer that any such intention did in fact exist. If such was my interpretation of the statute, I should not now be at liberty to assert it.

This court has, during this term, in the case of *Curtis v. Freeborn*,¹ given a different construction to the statute. It has ruled, and I think with manifest propriety, that, notwithstanding such denial, we may look to other parts of the answer, and to the facts conceded therein, for evidence consistent with and contradictory to such denial. The facts spread out in an answer may be disproved by other facts in the answer, and I can see no good reason why the question of fraudulent intention should furnish an exception. We must then, by this rule, to inquire whether this assignment bears upon its face such evidence of a fraudulent intent, as to bear the denial of the appellants in their answer.

The first badge of fraud to which our attention was directed was the fact that the partnership property had been assigned to secure an individual debt of one of the partners. We understand this to be true in fact. Grover and Gunn, in their answer, aver that they were justly, fairly, and *bona fide* indebted to each and every one of the creditors named in schedule class No. 1. At the head of that class stands the debt of Grover and E. S. Beach, which is alluded to by the counsel for the defendant as an individual debt, on the strength of the remark made in the schedule, that the debt was for the indorsement of notes. Again, G. and G. in their answer deny that

signment any payment is directed to be made without a real, existing, actual, and *bona fide* indebtedness and legal liability against them. And they further say that the debt of the Beaches was a judgment against them. Take this whole answer together, as we ought to do in order to give it full effect, and the inference is inevitable that, although the notes were signed only by one of the firm, yet they were given in the course of the partnership business, and both were legally and justly liable for their payment. These parts of the answer being, in my view, responsive to the allegations in the bill, are, in the state of this case, conclusive upon this point.

But even if it were otherwise, and the Beach debt had been against Grover alone, it does not follow that the assignment is therefore clearly fraudulent, or, indeed, that the direction to pay that debt to an individual creditor was any badge of fraud. Such direction might, as to partnership property, be held void as to partnership creditors; but this would be on the principle that partnership property must first go to pay partnership debts, and not on the principle that it was made with a fraudulent intention, and therefore void. It could hardly be deemed fraudulent for the debtor to assign his property to pay his debts; yet he might so assign it as to endeavor to give a preference which the law would not allow; and while it might be forbidden, because contravening a settled principle of mercantile law, it would by no means follow as a necessary, or, indeed, as it seems to me, a legitimate consequence, that he intended to defraud. I do not, then, in this part of the case discover anything indicating such a fraudulent intention as to justify me in holding the assignment void.

Another badge of fraud much insisted upon was, that the assignment delayed creditors by placing the property in such a condition that it could not be distributed within a certain time. In all cases of assignments of this character, and there are many confessedly legal and valid, some time must necessarily intervene between the execution of the instrument and a distribution of the property assigned. That time must be reasonable, and such as the circumstances of the case would justify. In one case, *Murray v. Biggs*, 15 Johns. 571, a year's locking up of the property was held not to be unreasonable, because some of the creditors lived in Europe. In another case, *Lippincott v. Barker*, 2 Binn. 174 [4 Am. Dec. 433], four months for the creditors to come in and assent was held not to be unreasonable. In the case of *Pearpoint v. Graham*, 4 Wash. C. C. 232,

Mr. J. Washington states the true rule, as I conceive it, that the object of the time taken was to give the creditors time enough to learn all the facts of the case, and make up their minds; and if a longer time was reserved than was necessary for this purpose, and in the mean time the property was to remain in the hands of an irresponsible assignee, there would be evidence of fraud. Here the time was three months. The amount of assets and of debts was very large. The debtors lived at Auburn; the creditors principally in New York; and a shorter time might with some propriety have been complained of as hurrying the creditors to a decision without giving them a full opportunity of investigation. The locking up of the property during this period is no such hindering of creditors as to indicate fraud. The property was protected, not against them, but for their benefit, and for an honest purpose. Not that it might be placed beyond their reach, but within their reach, so that they and no others might have the advantage to be derived from it: 4 Wash. C. C. 232; *Burd v. Fitzsimons*, 4 Dall. 76.

Another alleged badge of fraud, was the power given to the assignees to compromise with the creditors, and to set over debts to them. If this power could properly be considered as paramount to the other trusts declared in the assignment, and to have binding force in preference to them, the allegation of a fraudulent intention in this clause might be made with more force. But I conceive that this power is subordinate to, and to be exercised in conformity with the other parts of the instrument. The assignees could not rightly vary the preferences established in the deed, more especially after the creditors had, by signing, confirmed that preference. Any creditor might take the transfer of a debt or a particular sum in gross, without waiting for a final settlement of the trust; but he would have no right to more than his distributive share. By this construction of the instrument, we shall give effect to every part of it; a different construction must render nugatory some part of it. The former course is most within the line of our duty. In all cases of doubtful construction, we must adopt that which renders every part operative; for we are bound to presume that the grantor intended that every part should be operative, and that he never intended to put into it anything which would be nugatory, and therefore worse than useless. Such I understand to be the authority of the cases: 1 Gill & J. 345; 3 Cow. 284. Hence it follows, that in order to view this power of com-

promise as evidence of fraud, we are to construe the instrument in such manner as to render part of it inoperative, contrary to the fair interpretation of it, and in violation of a very salutary rule of law. This is going further for the purpose of presuming fraud, than I am willing to go.

The remaining, and, in my view, much the most important allegation of fraud, is that growing out of the provision in relation to the creditors in schedule H, class No. 2. The chancellor has supposed that the creditors named in that class who did not within the time specified release their debtors, were entirely excluded from any participation in the assignment, and that the debtors had thus created a very important condition to the creditors receiving any benefit from their property. If this was the true construction of this instrument, I should find no difficulty in agreeing with the chancellor in holding it void; but I do not so understand it. The first class consists of those who are named in it. No condition is annexed to their location; they have nothing to do in order to procure entrance there. The second class is different. The person to be admitted into it must not only be named in it, but he must execute a release of the debtors. Both these things are necessary to constitute a creditor a member of that class. Consequently, all creditors who are named as belonging to that class, but who do not execute a release, are excluded from it. Those who do release, and are not named in it, are equally excluded. The third class includes certain specified creditors, and all other creditors of Grover and Gunn. Other than what? Other than those included in Nos. 1 and 2. I do not see that the assignment will admit of any other construction. It seems to me then to follow necessarily, that a creditor named in the schedule H, class No. 2, but who does not release equally with the creditor who does release, but is not named, are excluded from the second class, and are included in the third class, as creditors other than those included in Nos. 1 and 2. If I am right in my construction, then the main ground fails on which the opinion of the court below rests. And the most that can with propriety be said is, that it is doubtful whether it will not bear the construction put upon it by the chancellor. Conceding this to be true, we find that we are called upon to construe an ambiguous instrument, not so as to give it effect, but so that we may presume a fraudulent intention from it. This point being settled, the whole question is this, whether the debtor ought thus to use his right to prefer, and whether, if he does so, it is such a

coercion of the creditor as will be evidence of fraud to avoid the whole assignment?

Let us pause a moment to view the operation of the assignment. Suppose that none of the creditors named in the class should execute a release; the effect would be that remaining after the payment of the first class, would be not between Grover and Gunn, but among all their other creditors, according to their respective claims. This would surely be fraudulent. It would be simply a preference to certain creditors, which is legal, and an equal distribution to all the other creditors, which is that equality so much cherished in courts of equity. Suppose that certain of the second class should sign, and others refuse, how would the matter? Not otherwise, that I can conceive, than if I were increasing the number of preferred creditors; and precisely the same would be the effect if all of the second class gave assent. I do not see how any principle of law would be violated in either of these cases more than in the other. The result would be simply to put it in the power of the creditors to increase the preferred class. Can this be fraudulent; and least of all can it be such evidence of a fraudulent intent as to be taken into account in our minds? This would be indeed extracting poison from the healthiest plants. In *Hyslop v. Clarke*, 14 Johns. 481, the court held that the debtor's reserving the power of increasing the preferred class was fraudulent. Surely you can not say the same by a directly contrary state of things. The question then, which this assignment, properly understood, puts into the mouths of Grover and Gunn, is briefly this: "We will give you a preference if you will discharge us; if you will not, we will retain our property, and dispose of it as you please." (See the court's words: "We are able to pay you half your debt, and release us. If you will not, take all we have, and hold it among you, and hold us still liable.")

This is, in my view, the proper construction of the assignment. I am very unwilling to concede that this is contrary to the law. If it is, the situation of the debtor must be a situation of hope. We can, without any great stretch of imagination, fancy cases in which a debtor may be overwhelmed with debt, beyond the possibility of liquidation, by the accumulation of all he has, and at the same time he may be under the force of that high and moral obligation of preference to his creditors, which the law has not only sanctioned but has also applauded. What is he to do? If he yields to

that obligation, and gives a just and deserved preference, our insolvent laws shut against him forever the door by which he might hope for a legal release. He can not be permitted to use his right of preference as an inducement to his creditors to release him; he must rely solely upon their tender mercies. While he has his property under his own control, he has a right to pay which creditor he pleases, and obtain a release. He can give any one such a preference as to enable him to obtain satisfaction out of his property, and he thus be released. Will his doing so to two or more be fraudulent? He may use his property, while yet in his hands, in compounding with his creditors and buying a release. So far, all is legal and just; yet the instant he puts his property beyond his own control, and transfers it to his creditors for their benefit, his attempt to do either of these things is fraudulent, and his acts are void; and all this for carrying into effect an intention which the law permits, by means which the law applauds. If this is to be the law, I can fancy no inducement which a debtor, in failing circumstances, can have to save his property from the waste which always follows in the train of a forced sale of it. You make it his interest to violate the obligation he may owe to some of his creditors, and to be dishonest, or at least careless of that property which can be no longer of any use to him.

I am aware that assignments of this character have been, and may very often be used as mere covers for gross frauds, and as means of carrying them into successful operation; and that our courts have therefore regarded them with great jealousy, and manifested a uniform leaning against them. I do not mean to be understood as condemning this course; on the contrary, it meets my approbation, as a general rule. But it may be carried too far, and I can not resist the conviction that such will be the result of our affirming the chancellor's decree in this case.

The authorities have in no instance gone so far as we are now required to go, and we are therefore called upon to establish a new principle. The case of *Hyslop v. Clarke*, 4 Johns. 458, is the leading case in the courts of this state. There the creditors were to execute a release; in case they did not, the fund was to be paid to such other creditors as the debtors should appoint, and the surplus to be paid to the assignors. Now, in the first place, in that case, there was a resulting trust for the debtors, to the exclusion of the refusing creditors, which, of itself, was enough to avoid the deed. There is no such trust in the case now before this court. Nothing is to go to Grover and Gunn

until all their debts are paid. In the next place, were to be entirely excluded, unless they released said, upon this point, that it was not pretended that the instrument to Hyslop and Campbell was for the purpose of giving a preference to some of the creditors of the estate, to cause a just distribution of their estate to be made among all; but in this case both those things are pretended to be made out. An honest preference is intended, and a just distribution among all. None are excluded.

The case of *Murray v. Riggs*, 15 Johns. 571, decided by the court in 1818, was cited by the chancellor, but not on this point. There the trusts were to pay the debtor for his support, and the creditors who should not accept the conditions should be entirely excluded; the assignment was held to be valid. This case would not support an assignment, than we can be asked to sustain this. In *Austin v. Bell*, 20 Johns. 442 [11 A.], the trusts were to pay the assignor a certain amount, unless the creditors signed the instrument which released the debtors, the share of the refusing creditors was to be paid to the assignors. The court decided that the trust, they were bound by the decision of *Murray*. On the second trust the deed was void, because it was a reservation by the debtors, to their own use and benefit, which ought to have been appropriated to the payment of their debts; and Chief Justice Spencer says that a debtor does not fairly devote the property of a person overwhelmed in debt to the payment of his creditors, but reserves it to himself, unless they assent to such terms and conditions. A reservation, is in law fraudulent and void as against creditors. The cases of *Seaving v. Brinkerhoff*, 5 J. & W. 20, and *Burd v. Smith*, 4 Dall. 76, recognize and apply the principle, but they do not decide this case. Here the case of persons overwhelmed in debt is fairly devoted to the payment of their creditors; here is no reservation to a portion, to the exclusion of any creditor; here the creditors are not excluded from all benefit of the assignment, unless they assent to certain conditions; here the debtor gives up the property to the creditor's refusal to comply with those conditions. The case of *Mackie v. Cairns*, 5 Cow. 579 [15 Am. Dec. 1833], is the only remaining case that I see in this court, is the only remaining case that I see at this time in examining. The chief justice, in delivering the opinion of this court, uses this language, that "a failing

mitted to prefer in payment such creditors as he pleases. This is giving him power enough; but when he appropriates the property to his own use, the act becomes fraudulent. Nor does it lie in his power to prescribe terms to his creditors. The law is open to them, they have a right to pursue their debtor in the mode pointed out by the law, and any act which obstructs them in their pursuit is against law, and of course void, unless such act appropriates the property to the payment of debts."

Here, then, is a plain and simple rule, easily understood, and not difficult of being carried into effect, by which creditors may have the whole of the property of the debtor, and he be unable to reserve from them anything which fairly belongs to them. This, I think, is going far enough, and perhaps as far as we can go, without judicial legislation of an unusual character; and this rule very much curtails the limits prescribed for such assignments by the case of *Murray v. Riggs*. Only a few steps more are necessary to destroy these assignments altogether. One of those steps we are now required to take. I am not prepared to do so. It is wise thus far to restrict their operation; they can not be regarded too closely. But I am persuaded that their entire destruction would, in the absence of a bankrupt law, be productive of much more evil than could possibly accrue from the frauds which might be perpetrated under their cover, when bound down by the restrictions which we have already thrown around them, and when such facilities are afforded to enlightened and intelligent courts to pursue them to their most concealed recesses. The case of *Mackie v. Cairns* does not apply to the case before us; but the latter comes distinctly within the exceptions of the rule there laid down. Here is no appropriation of the debtor's property to his own use; but there is an appropriation to the payment of debts.

Hence I have arrived at the conclusion that there is no fraud in fact in this case, and that no rule of law requires or would even justify us in inferring a fraudulent intention from the face of the assignment itself; and inasmuch as an intention to defraud must exist in order to enable our statute to operate, this assignment is not void, because there was no intention in Grover and Gunn to defraud their creditors; but, on the other hand, an honest intention of appropriating their property for the benefit of their creditors. I have not examined the question whether this assignment was void by the common law, because, if it was, it would be void only in part, void only so far

as relates to class No. 2. Therefore, after the payment of the first class, all the other creditors would come in for an equal distribution, and the assignment be good for that purpose: 20 Johns. 447; 5 Cow. 564.

I do not mean to be understood as saying that a debtor can not so exercise his right of preference as to evince a fraudulent intention; but I do not conceive that the exercise of that right in this case exhibits any such intention, or that we can fairly draw from its exercise by these debtors any just presumption of a fraudulent purpose. Nor am I to be understood as questioning, in the slightest degree, the authority of *Mackie v. Cairns*. That case and the case of *Austin v. Bell*, in a great measure, overrule the case of *Murray v. Riggs*, and rightfully, I think. But I do not understand the case of *Mackie v. Cairns* as establishing any principle which requires that this assignment should be declared void. It comes distinctly within its exception, and seems to me to be sanctioned by its doctrine. I go this length, and no farther, that the exercise of the right of preference in the manner that Grover and Gunn have done in this case, is not, of itself, sufficient evidence standing alone of a fraudulent intention in them, to make void the assignment.

Having thus stated my reasons for differing in opinion with the chancellor, I will not attempt to deny that I have done so with some hesitation. One consideration, however, has had much weight with me; there is not, in the whole case, anything to show that Grover and Gunn intended in fact to defraud their creditors; but much to show that their real intention was to make a division of all their property among their creditors, reserving none to themselves. Such being the real and operative motive for this assignment, it seems to me that it ought to be liberally construed to give it effect; that we ought not hastily to infer collusion, secret trust, and meditated frauds, but rather incline to sustain an instrument which purports to do that which the dictates of law and morality require of a failing debtor.

In my opinion the decree of the chancellor ought to be reversed.

TRACY, Senator. There would, I think, be little difficulty in sustaining this assignment, except for the provision in it that imposes, as the condition on which certain creditors shall be entitled to preference in the distribution of the assets, that they shall, within three months from the time, when thereunto requested, agree to receive such distribution in full discharge of

their respective demands. I do not concur in the chancellor's opinion that the provision which authorizes the assignees to compound, forms a more objectionable feature than this, or even that it is so objectionable as to make the instrument void on its face. The argument against it only shows that in the exercise of this power, great abuses might be practiced; but the same objection may be made with more or less force against every trust. At most, this provision affords only a presumption of fraud, and this presumption is sufficiently rebutted by the answer.

I consider the case, therefore, to involve only the inquiry whether an insolvent can insert in a voluntary assignment a provision which shall, either absolutely or contingently, secure for himself any other benefit or advantage, except that of having his estate applied, so far as it will go, to the payment of his debts. The proposition which this inquiry involves has been much litigated, and conflicting and perhaps equally respectable authorities are arrayed on the one side and the other. After the full examination which the chancellor has made of these authorities, it will not be necessary minutely to review them, especially as upon a careful consultation I am persuaded that they are so equally balanced as to leave the present case as open for our independent determination as though the question it involves was now for the first time agitated. In *Halsey v. Whitney*, 4 Mason, 229; *Lord v. Brig Watchman*, No. 16 Law Journal, 284,¹ and *Atkinson v. Jordan*, 5 Ham. 293 [24 Am. Dec. 281], the subject has been recently examined and ably discussed; and yet the decision in each case is under circumstances that deprive it of any controlling weight, and which leave us free to dispose of the question on what we may consider its original intrinsic merits. It is in this view that I am disposed briefly to examine it.

Voluntary assignments, which enable a debtor in failing circumstances to delay and defeat the diligence of particular creditors, by transferring his property to trustees of his own selection, is an invention, comparatively, of modern origin. I doubt if they have been known for more than forty or fifty years; at least, I can find no case of their distinct recognition in the English courts prior to 1805. It is true that a voluntary assignment by means of what is called a deed of composition, is of much older date. But this is a very different affair, for the creditors are parties to this deed, and the assent of all of them is required to give it validity. Voluntary assignments have,

1. *The Watchman*, Ware, 232.

however, of late years, been sustained by courts of law, and sometimes, I confess, under circumstances which I can hardly reconcile with my own notions of legal justice. But it will be found that in the first cases where such assignments are sanctioned, the courts were influenced entirely by the consideration that they operated to secure an equal distribution of the insolvent's property among all his creditors. They saw that the principle of such assignments trenched upon a fundamental maxim of the common law, and was apparently repugnant to the very wording of the statute of frauds. But the rule of chancery that equality is equity, prevailed over the common law principle *vigilantibus non dormientibus leges subveniunt*; and courts permitted the debtor to arrest the diligence of one creditor, in order to provide for the interests of all.

In one of the earliest English cases, *Pickstock v. Lyster*, 3 Mau. & Sel. 371, the validity of such an assignment is put wholly on the ground that it effected an equal distribution among all the creditors; and this circumstance induces Lord Ellenborough to remark, that "such an assignment is to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to the character of the debtor, to make the fund available for the whole body of creditors." Bayley, J., also observes, "this conveyance, so far from being fraudulent, was the most honest act the party could do—not having sufficient to satisfy all his debts, he proposes to distribute his property in liquidation of them." In 3 Price, 6, Chief Baron Richards, commenting on the case of *Pickstock v. Lyster*, says, "it was decided on the ground of the assignment being for the equal benefit of all the creditors."

It is singular, when the right of an insolvent to lock up his property from the legal pursuit of one creditor, by a deed of assignment, was put on the principle of securing an equal distribution among all his creditors, that it was immediately extended, so as to embrace and combine with it, another and a completely contradictory principle—that of preference among creditors. But so it is, that voluntary assignments, which were first allowed to prevent inequality in the distribution of an insolvent's assets, are now resorted to as the most efficient means for securing this inequality. To prevent a rightful preference, the result of legal diligence, an act is tolerated which secures to the debtor a capricious preference vastly more unequal. Either principle—that of assignment or that of preference,

standing by itself, might very well be questioned; but brought together, they form an unnatural coalition from which little that is salutary or honest can be anticipated.

I know that the right of preference is advocated by many enlightened jurists, on the ground that the debtor, possessing an intimate knowledge of the relative equities of his creditors, can make a more just distribution than the law. But there is apparently an inconsistency in the law's denying the rightfulness of its own rules, and in its recognizing a difference between obligations which it has already decided to be equal. Besides, it is anomalous that the law should defer its own wisdom and honesty to the wisdom and honesty of a delinquent party. The true reason why this right of preference has been allowed to the debtor, is, that whilst the property is in his hands, unshackled of legal liens and incumbrances, his power over it is absolute, and as he can dispose of it by sale to any person, so he may dispose of it by way of satisfaction to any creditor; and it is only by a bankrupt law, like that of England, that this control of a debtor over his own property can be arrested, except in cases provided against by the statute of frauds.

It is thought, by some, that this right of preference favors commercial enterprise, by affording to those destitute of capital a credit founded on the power of securing confidential, at the expense of business creditors. If this be so, it is, at best, but a poor argument in its favor; for it is founded obviously in wrong. The facility of obtaining credit under such circumstances is, in theory, nothing more than a facility of committing fraud, and in practice it has proved nothing less; but it may well be doubted whether, on the whole, commercial credit is promoted by this right of preference. There is certainly no reason why it should be; for, allowing that it enables a person to obtain indorsements or accommodation loans, founded on the confidence that his whole property is to be first appropriated for their discharge; yet this very fact, it would seem, must operate to produce greater distrust and caution with his business creditors.

But however this may be, I am satisfied that the experience of all commercial communities leads to the conclusion that this power of preferring creditors is a fruitful source of frauds, and in every respect mischievous and unwholesome. Indeed, the law of our own state, though it tolerates, does not favor this preference. The legislature has discountenanced it, by denying the relief of our insolvent act to such debtors as have

exercised it in contemplation of insolvency. If, therefore, it was a question arising now for the first time, whether an assignment by an insolvent, which contained a provision securing a preference to favored creditors, was or was not against the policy of the statute of frauds, I should hesitate very much before I decided that it was not. But the question is not now open, having been repeatedly settled by our highest judicial tribunals, to whose decisions I yield a ready submission. But whilst I do this, I am not disposed to go one line beyond the adjudged cases to uphold and extend a principle, the general influence of which I am persuaded is unjust and mischievous.

In the present case, we are asked to sustain an assignment which has not only secured an absolute preference to one class of creditors, but also seeks to secure to the debtors themselves an important advantage, by offering a contingent preference to another class of creditors. This latter preference is on condition that the creditors last referred to shall, within three months from the time when thereunto requested in writing by the trustees, agree by a writing under a seal, to receive such proportion of their debts respectively as can be paid from the residuary avails, in full discharge of all their respective demands against the creditors. This appears to be a positive delay of this class of creditors, by placing the property out of the reach of their legal pursuit, and in a condition that it could not be distributed within any certain time, nor otherwise, except at the discretion of the trustees.

It is no answer to say that, although no time is defined for the assignees to give the notice, yet the law imposes on them the duty of giving it within a reasonable time. The question of fraud is not to be settled by the simple fact that an ultimate remedy exists for the creditor: but by the fact that the debtor has delayed the remedy for his own advantage. Here the creditors are to be delayed in receiving property which undeniably belongs to them the minute it comes to the hands of the trustees. For whose benefit is this delay? Not for the creditors, for they will get no more after they shall assent or refuse to assent to the condition proposed, than they would get immediately, if there had been no such condition. The delay is manifestly to benefit the debtors, in order that they may secure from it an advantage to which they have no rightful claim. Conceding it to be the true construction of the assignment, that if the creditors named in the second class refused to give a release, they were then only postponed to the subsequent class; still

they were delayed, at least for the time necessary to make the experiment, and this for no other purpose than that the debtors might have the benefit of the experiment. If the debtors had no right to lock up the property in the hands of their assignees until the creditors would execute releases, what right had they to lock it up in their hands until the assignees should choose to ascertain that the creditors would not execute releases? The principle of the delay is the same in one case as in the other. If we throw out of view the preferred creditors of the first class, and regard those of the third class in their true character, merely nominal creditors, the nature of the provision relative to the creditors of the second class may be more easily ascertained. In this view the whole property of the insolvents would be locked up in the hands of the assignees until they should choose to ascertain whether every individual creditor would accept his share and give a release. For, until the final decision of every creditor was ascertained, no distribution could be made to any one of them.

Grant that if all finally decided not to give a release, the whole property would then be distributed among them, the same as if no attempt to obtain a release had been made; yet it is obvious that this distribution could not be made until after a long delay; and a delay solely for the debtor's benefit. The creditors could gain nothing by it, for at last they would get no more than they were entitled to at first. If the debtors had no right to insist on a release, as the condition alone upon which their property should be distributed, neither had they a right to make a condition designed and calculated to procure a release. The law will not allow a person to accomplish indirectly what he is prohibited from doing directly. Upon every moral principle, the property of an insolvent belongs to his creditors; and, although the law tolerates him in distributing it among them according to his notions of right, yet it will not tolerate him in locking it up, in order that in its final distribution he may secure a future benefit to himself. In short, while the law permits a debtor to prefer one creditor to another, it will not permit him to prefer himself to any creditor.

It is said, however, that inasmuch as the debtor, whilst the property is in his own hands, may legally stipulate with any particular creditors to turn over some part of it in satisfaction of his debt, therefore it is reasonable that he should be able to delegate the same power of compromising to his assignee. But the cases are different. In the one, he has not locked up the

property by an assignment to the delay of his creditors, but keeps it openly in his own hands, exposed to the legal action of his creditors, up to the time that he disposes of it absolutely, in satisfaction of an existing debt. In the other, he puts it out of his hands for the very purpose of protecting it against the legal remedies of particular creditors, and then asks, not that its application to the payment of his debts shall be sanctioned, but that he may be allowed to keep it under cover, and out of the reach of legal process for a time, forasmuch as he does not design to keep it always under cover.

It is also said, that as a debtor has the right to prefer such creditors as he pleases, he has consequently the right of preferring them on such terms as he pleases. But it does not follow, that because a debtor may make a present preference, he may also provide for a future preference, contingent upon some act of a creditor, beneficial to himself. Such a power in a debtor would nullify the statute of frauds, by leaving him at liberty to lock up his property until he had coerced his creditors to such terms as he was pleased to dictate. The only ground on which the validity of voluntary assignments can rest is, that they contemplate nothing but a distribution of the debtor's property to his creditors, in some way. It may be by distributing it among all his creditors unconditionally; or, if particular creditors are preferred, then it should go to them unconditionally; for the preference of one creditor to another should not be dependent on conditions to be performed, or on future contingencies, but must be a present preference founded on circumstances existing at the time of the assignment. If a debtor be allowed to proceed beyond the single purpose of paying his debts, it is not easy to foresee at what point he can be arrested. The only safe rule is, to regard every assignment which operates to delay creditors for any purpose whatever, not distinctly calculated to promote their interest, as contrary to the policy of the statute of frauds.

In this case, the real object of the provision in the assignment is not so much to afford a preference to particular creditors, as to secure a release from them. And to this end it seems admirably adapted. It is contrived so as to create a scramble among the creditors; and a scramble under such circumstances that its natural result will be an unjust advantage to the debtors. It takes away from every creditor the power of acting in the premises, according to his individual wishes and judgment, and makes his final course dependent on the course adopted by

every other creditor. It is true, if all concur in refusing to release, that they will ultimately be put on an equal footing; but that they will concur can not be known, for each is called on to decide for himself, without knowing what will be the decision of the others, at the same time that a knowledge of that decision is indispensable for his own safe judgment. And why is all this perplexity and embarrassment to be suffered? Not for the purpose of effecting a just distribution of the estate, but for that of securing by its skillful distribution an important advantage to the debtors. Is this an advantage which a debtor may rightfully attempt to secure by the assignment of his property; or is it one to which, in equity and good conscience, he is entitled? It seems to me that this inquiry carries with it its own answer.

The law does not recognize any right, on the part of an insolvent debtor, to an absolute discharge from his creditors on distributing among them his estate. One who contracts a debt, agrees not merely that he will pay it, if his present property is sufficient, but also if his future exertions shall give him the power. In short, he pledges but the property he possesses and his capacity to acquire property. It is not true that parties have in view only the property in possession when the contract is formed, or that the obligation of indebtedness does not extend to future acquisitions.

The prospect of an inheritance frequently forms a leading inducement to credit, and industry, talents, and integrity constitute a fund which is as confidently trusted to as property itself. There is not a country in the world where a debtor, by his own act, can compel his creditors to take his property, and discharge him from his indebtedness. The *cessio bonorum* of the Roman law, which greatly mitigated the severity of the ancient law, by releasing the debtor who delivered up his estate to his creditors from a degrading servitude, did not operate to extinguish the debt. His subsequent acquisitions, with some exceptions, were liable, until his debts were fully paid. This also is the principle of our laws to relieve debtors from their liability to imprisonment. The law commonly called the two-thirds act is on a different principle. But an insolvent debtor can not obtain the benefit of this act without the concurrence of a large majority of his creditors, nor then, without incurring high legal responsibilities and subjecting himself and his transactions to severe judicial scrutiny. But if assignments like the one under consideration are encouraged, insolvent debtors will be able, with-

out incurring the expense and perils of judicial proceedings, to coerce a full discharge from their creditors, though no part of them freely concur in it; and this, too, without an oath, or in any other way affording to their creditors an opportunity to show that they are not dealing honestly and fairly.

In my view, the right, either legal or moral, of a debtor to provide in his assignment for a release from debts which he has not paid, stands on no better ground than a right to secure from his creditors a return of a certain percentage on the property distributed, or an engagement that his creditors shall give him a new credit. If either of these had been imposed as the condition on which the creditors named in the second class were to receive a distribution, there would seem to be no doubt of the assignments being void, within the principle of cases already adjudged. Indeed, I think this case closely approximates the principle of that of *Hyslop v. Clarke*, 14 Johns. 458. There all the property was to go ultimately to the creditors, or to some of them. No part of it was to come back to the debtor in any event. He only reserved the right in case all his creditors would not accept it in full discharge of their debts, to appoint the particular creditors to whom it should be distributed; and this appointment to be made as soon as any creditor should refuse to accept and release. The objection to that assignment was, that it did not actually give a preference, but was in effect an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preference at some future time. In the present case, the objection is, that the assignment does not actually give a preference to the creditors in class number two, but proposes to give it at some future time, on condition that they will do an act beneficial to the debtors. If in *Hyslop v. Clarke*, the assignment, instead of reserving to the debtors a contingent power of appointing the ultimate distributees, who were to take the property in case all the creditors did not agree to release, had actually designated them, it would not, as I perceive, have any the less placed the property out of the reach of the creditors, with a view to a preference at a future time. It certainly would have been no less coercive on those creditors who were to receive a distribution on condition of executing a release. In both cases the debtors seek to continue their control over the property after it is assigned, for the purpose of so wielding it as to coerce their creditors, or some of them, to pay

a consideration for that which, in justice and good conscience, already belongs to then.

Another point made by the appellants is, that if this provision of the assignment is illegal, yet, as the answer denies any intent to defraud, it is bad only by the common law, and it is not void under the statute; and consequently that the remaining parts of the assignment should be sustained. This distinction can not be supported in the present case. The statute of frauds refers to a legal, and not a moral intent; that is not a moral intent as contradistinguished from a legal intent. It supposes that every one is capable of perceiving what is wrong, and therefore, if he do what is forbidden, intending to do it, he will not be allowed to say that he did not intend to do a forbidden act. A man's moral perceptions may be so perverted as to imagine an act to be fair and honest, which the law justly pronounces fraudulent and corrupt; but he is not therefore to escape from the consequences of it.

Some debtors may sincerely believe it morally right to conceal a part of their property for the support of their families; others, that they should exact a discharge from their debts, on giving it all up. But the law must have a more certain standard for measuring men's intents, than each individual's varying and capricious notions of right and wrong. It judges men's motives from their actions, for it can not enter into the recesses of a man's conscience and interrogate his intents. In this case, although the debtors intended by their assignment, so far to delay and embarrass their creditors as to induce them, on receiving a small part of their claims, to release the residue, yet doubtless they did not intend to do what they supposed the law would pronounce fraudulent, much less what would defeat the whole purpose of their assignment; and this is what I understand them to mean in their answer, by denying that "the assignment is fraudulent in law, or made with a fraudulent intent." In short, I see no reason for making this case an exception to the well-settled rule, recognized distinctly in *Mackie v. Cairns*, 5 Cowen, 548 [15 Am. Dec. 477], that a deed, void in part as being void against creditors, is void in whole; and I am therefore for affirming the chancellor's decree.

After the several opinions delivered in the cause had been read, Mr. Justice Sutherland proposed the following resolution for adoption: "Resolved, that the assignment is void, because it makes the preference given to the creditors of the assignors, designated as class No. 2, to depend upon the condition that

the preferred creditors shall give the assignors an absolute discharge of their debts;" and on the question being put, "Shall this resolution be adopted?" the members of the court voted as follows:

In the affirmative—The President, C. J. Savage, Justices Sutherland and Nelson, and Senators Armstrong, Beardsley, Conklin, Cropsey, Deitz, Lynde, Macdonald, Sherman, Stowey, Tracy, Van Schaick—15.

In the negative—Senators Edmonds, Gansevoort, Griffin, Sudam, Westcott—5.

And the court accordingly affirmed the decree of the chancellor, the final vote being the same as on the passage of the resolution.

Counsel were heard on the question of costs, upon which there was a considerable difference of opinion. It was finally resolved, by a vote of fourteen to ten, that the costs of both the appellants and the respondent in this court as well as in the court of chancery, up to the time of filing this appeal, be paid out of the funds in the assignees' hands.

Decree affirmed, costs to be paid out of the fund.

ASSIGNMENT FOR BENEFIT OF CREDITORS, RESERVATION IN, for the benefit of the assignor or his family, renders it fraudulent: *Mackie v. Cairns*, 15 Am. Dec. 477, and note; *McClurg v. Lecky*, 23 Id. 64, and note. The principal case is relied on as an authority to the same effect, in *Doremus v. Lewis*, 8 Barb. 128; *Curtis v. Leavitt*, 15 N. Y. 116, 131, per Comstock, J.; *Nicholson v. Leavitt*, 4 Sandf. 302.

DEBTOR MAY PUT ALL HIS CREDITORS ON AN EQUALITY by assigning his property, or conveying it to a trustee for ratable distribution: *Corning v. White*, 22 Am. Dec. 659, and note.

DEBTOR MAY PREFER CREDITORS, if it be done fairly and in good faith: *Wilkes v. Ferris*, 4 Am. Dec. 364; *Mackie v. Cairns*, 15 Id. 477; *Buffum v. Green*, 20 Id. 562. To the same effect are: *Waterbury v. Sturtevant*, 18 Wend. 363; *Birdseye v. Ray*, 4 Hill, 163; *O'Neil v. Salmon*, 25 How. Pr. 252; *Burdick v. Post*, 12 Barb. 176; *Curtis v. Leavitt*, 15 N. Y. 197, per Paige, J.; all citing *Grover v. Wakeman*.

PROVISION EXACTING A RELEASE AS A CONDITION OF A PREFERENCE in an assignment avoids it: *Atkinson v. Jordan*, 24 Am. Dec. 281, and note. The authority of *Grover v. Wakeman*, for the same principle, is recognized in *Goodrich v. Downs*, 6 Hill, 439, 441; *Van Nest v. Yoe*, 1 Sandf. Ch. 10; *Mead v. Phillips*, Id. 87; *Ames v. Blunt*, 5 Paige, 22; *Mills v. Levy*, 2 Edw. Ch. 186; *Hone v. Woolsey*, Id. 291; *Curtis v. Leavitt*, 15 N. Y. 144, per Brown, J.; *Marsh v. Bennet*, 5 McLean, 130. So generally that coercive conditions in an assignment avoid it: *Berry v. Riley*, 2 Barb. 308; *Averill v. Loucks*, 6 Id. 476; *Spaulding v. Strang*, 32 Id. 240; 36 Id. 317; S. C., in court of appeals, 37 N. Y. 139; 38 Id. 13, where Parker, J., refers to *Grover v. Wakeman*, as "a leading case on this subject:" *Haydock v. Coope*, 53 N. Y. 74.

THAT AN ASSIGNMENT MUST DEVOTE THE WHOLE PROPERTY of the debtor absolutely and unconditionally to the payment of debts, to render it valid, is held, citing *Grover v. Wakeman*, in *Smith v. Woodruff*, 1 Hilt. 463; *Yates v. Lyon*, 61 Barb. 209; *Young v. Heermans*, 66 N. Y. 382. The case is referred to on the same point, with apparent disapproval, as to some of the principles laid down in it, in *Wilson v. Forsyth*, 24 Barb. 123.

TRUSTS AND PREFERENCES MUST BE DECLARED in the assignment, and must not be left to the future determination of the assignor or assignee, or the assignment will be void: *Sheldon v. Dodge*, 4 Den. 221; *Smith v. Howard*, 20 How. Pr. 127; *Strong v. Skinner*, 4 Barb. 559; *Brainerd v. Dunning*, 30 N. Y. 214, all citing the principal case. In *Bellows v. Patridge*, 19 Barb. 178, the foregoing opinion of Sutherland, J., as to the effect of a provision in an assignment authorizing the assignee to compromise claims, seems to be disputed.

OTHER POINTS TO WHICH THE CASE IS CITED, are: That an assignment, deed, or mortgage, void in part, is void *in toto*: *Woodburn v. Mosher*, 9 Barb. 257; *Fiedler v. Day*, 2 Sandf. 597; *Russell v. Wiane*, 37 N. Y. 596; S. C., 4 Abb. Pr. N. S., 390, *per* Woodruff, J.; *Mittnacht v. Kelly*, 3 Keyes, 408; S. C., 5 Abb. Pr. N. S. 445; 46 How. Pr. 458. As to the effect of an assignment of partnership property to pay separate debts of a partner: *Jackson v. Cornell*, 1 Sandf. Ch. 352; *Burtus v. Tisdall*, 4 Barb. 589; *Knauth v. Bissett*, 34 Barb. 35; *Heye v. Bolles*, 33 How. Pr. 277; S. C., 2 Daly, 236. As to the proper mode of construing instruments capable of a two-fold construction: *Nicholson v. Leavitt*, 10 N. Y. 593, *per* Edmonds, J.; *Du Bois v. Ray*, 33 How. Pr. 297; S. C., 35 N. Y. 166; *McKinstry v. Sanders*, 2 N. Y. Sup. Ct. (T. & C.) 190. As illustrating the conflict of professional opinion on the subject of the validity of assignments: *Hyer v. Ayres*, 2 E. D. Smith, 220. That fraud is not to be presumed in an assignment: *Doremus v. Lewis*, 8 Barb. 127. That payments made by trustees under an assignment before a bill is filed to set it aside, should be allowed: *Millem v. Earle*, 24 N. Y. 113. That all the creditors need not be made parties to a suit to set aside an assignment: *Bank of British North America v. Suydam*, 6 How. Pr. 380. As to the payment of costs out of the estate: *Downing v. Marshall*, 37 N. Y. 392. That a judgment creditor may file a bill to reach *choses in action*, and goods fraudulently assigned: *Storm v. Waddell*, 2 Sandf. Ch. 512.

PARKS v. JACKSON EX DEM. HENDRICKS.

[11 WENDELL, 442.]

RULE OF LIS PENDENS IS NOT AN ARBITRARY ONE, and should not be applied where the reasons for its original adoption do not exist.

RULE OF LIS PENDENS DOES NOT APPLY TO STRANGERS whose rights existed before the suit was commenced.

RULE DOES NOT APPLY TO A PURCHASER IN POSSESSION, in accordance with a previous *bona fide* contract providing for payment in installments, who has made valuable improvements, and who pays the purchase money and receives a deed after a suit commenced by a creditor of a prior owner, to set aside the conveyance to his grantor as fraudulent.

SUCH PURCHASER IN POSSESSION SHOULD BE MADE A PARTY to the suit; otherwise, if he be not actually notified of the fraud in his vendor's

title before paying the purchase money and taking his deed, he will not be affected by the decree setting aside the conveyance to his grantor.

POSSESSION IS NOTICE to all the world of the nature and extent of the possessor's interest,

PURCHASER FROM THE GRANTEE IN A CONVEYANCE IN FRAUD of creditors will be affected by the fraud, as to every act done to perfect title after notice of such fraud.

SHERIFF'S DEED BEFORE THE TIME FOR REDEMPTION has expired, it seems, is void on its face. *Per Seward, Senator.*

ERROR from the supreme court, to reverse a judgment rendered in favor of the defendant in error, who was plaintiff below, in an action of ejectment. From a special verdict found in the case, it appeared that the premises formerly belonged, two thirds to one Samuel Franklin, and one third to one Embree; that they entered into articles of agreement in 1803 with one Rowley, and in 1805 with one Ingersoll, whereby they covenanted to convey to the said Rowley and Ingersoll respectively, certain portions of the premises in dispute, on payment of the purchase money, which was to be paid in installments, Rowley's last installment to be paid on or before September 1, 1809, and Ingersoll's on November 30, 1811, the purchasers covenanting to build dwelling-houses on the land. The said purchasers immediately entered into possession under their contracts, built houses, and made other valuable improvements. Ingersoll subsequently sold to one Boughton his rights under the contract. Boughton took possession, and substituted new articles of agreement with the vendors for those entered into by Ingersoll, whereby it was stipulated that the last installment should be paid August 28, 1811. Samuel Franklin died in 1807, having devised his realty to his sons Abraham and John, who, on March 29, 1808, by a deed recorded June 5, 1808, conveyed to Henry Franklin. The latter and Embree, on November 12, 1810, conveyed to Rowley his tract, taking mortgages for their respective portions of the purchase money, which was all unpaid. Rowley conveyed, subject to these mortgages, to Parks, defendant, in April, 1813, and the latter paid off the mortgages in June, 1813. Boughton paid the last installment due on his portion to Henry Franklin and Embree, June 25, 1811, and received a conveyance. On April 13, 1813, Boughton conveyed to Parks.

It further appeared that in May, 1808, the plaintiff recovered judgment for a large sum against Abraham Franklin, and a like judgment for another sum against John Franklin in June, 1808. On June 30, 1809, the plaintiff filed his bill against Abraham,

John, and Henry Franklin, to set aside the conveyance to the latter as fraudulent, being intended to defeat the collection of the judgments which the plaintiff was about to recover against the grantors in the actions then pending. In January, 1817, a decree was obtained declaring said deed void. Neither the defendant, nor either of his grantors, was made a party to that suit. In May, 1817, and May, 1820, the plaintiff had executions on his two judgments, under which the premises were sold and conveyed to him and one Tibbits, between whom and the plaintiff, partition was afterwards made. Judgment for the plaintiff, and the defendant brought error.

J. A. Colier and J. A. Spencer, for the plaintiff in error

B. F. Butler, for the defendant in error.

WALWORTH, Chancellor. If the conveyance to Henry Franklin was fraudulent, the judgments against Abraham Franklin and John Franklin were, at the time of the commencement of the chancery suit, legal liens upon the two thirds of the lots in question, devised to Abraham and John Franklin by the will of their father; and a conveyance by the sheriff, under executions upon those judgments, would, at that time, unquestionably have vested in the purchaser at the sheriff's sale, such a title as to enable him, at law, to recover from the persons then in possession, under the contract to purchase, two thirds of the lots; but in a court of equity, a judgment which is only a general and not a specific lien upon the real estate of the debtor, will be so controlled as to protect the prior equitable rights of third persons against the legal lien of the judgments, and also against purchasers under an execution thereon, chargeable with either actual or constructive notice of such equitable rights: *Ex parte Howe*, 1 Paige Ch. 125 [19 Am. Dec. 395]; *Hampson v. Edelen*, 2 Har. & J. 64 [3 Am. Dec. 530]; 1 Atk. on Conv. 512.

Where the vendee of the judgment debtor is in the actual possession of the premises, under a contract to purchase, executed prior to the docketing of the judgment, the purchaser at the sheriff's sale will be chargeable with constructive notice of the equitable rights of such vendee, and will take the legal title subject to the same: *Tuttle v. Jackson*, 6 Wend. 213; *Buck v. Holloway's Devises*, 2 J. J. Marsh. 180; *Chesterman v. Gardner*, 5 Johns. Ch. 33 [9 Am. Dec. 265]; and in such a case, if the whole of the purchase money had been paid at the time of the recovery of the judgment, or had been specifically appropriated to the payment of prior incumbrances on the premises,

there could be no doubt that the purchaser at the sheriff's sale would be considered in equity as holding the legal estate in trust for the original vendee; and upon a proper application to the court of chancery, he would be restrained from prosecuting a suit at law against such vendee, or his assigns, to recover the possession of the property.

As the legal title alone is in question in the present suit, it is not necessary here to express any definite opinion as to the legal lien of a judgment recovered against the vendor in a prior contract of sale upon the unpaid purchase money. In the state of Pennsylvania, where every equitable as well as legal interest in land is settled by action at law, it has been decided that a judgment against a vendor who has contracted to sell, but has not received the whole purchase money, is a lien on the vendor's interest; and that a purchaser under such judgment will stand in the place of the vendor, and will be entitled to the unpaid purchase money, and upon payment of the same will be bound to make a deed to the vendee, according to the original agreement: *Fasholt v. Reed*, 16 Serg. & R. 267. In Maryland, on the contrary, it appears to have been held that the vendee who, subsequently to the recovery of a judgment against his vendor, but without any actual notice thereof, had paid over a balance of the purchase money, and taken a conveyance from such judgment debtor, was in equity entitled to protection against the claim on the part of the judgment creditor, to a legal lien upon the premises: *Hampson v. Edelen*, 2 Har. & J. 64 [3 Am. Dec. 530].

The last case, however, shows that a subsequent conveyance from the judgment debtor, in pursuance of his contract, does not at law overreach the judgment by relation, and that the vendee must resort to a court of equity to protect himself against a sale under the judgment, which would render the conveyance from his vendor, subsequent to the docketing of the judgment, inoperative in a court of law. This was also expressly decided in the case of *Butts v. Chinn*, in the court of appeals of Kentucky, 4 J. J. Marsh. 641, where the purchaser at the sheriff's sale was permitted to recover in ejectment, on the ground that the conveyance from the vendor, which was executed after the lien of the judgment attached, although in pursuance of a previous contract, was at law overreached by the subsequent sale under the judgment. A conveyance therefore of the legal estate to the vendee, in pursuance of the original contract, does not operate by relation back to a time when the

vendee was not entitled to a deed by the terms of such contract, so as to divest the lien of an intermediate judgment against the holder of such legal estate. In the cases referred to on the argument, in which sheriffs' deeds were deemed to have relation back to the sale, so as to convey the legal right to the purchaser from that time, the sales had taken place previous to the passing of the act of 1820, giving time to the judgment creditor to redeem. The title of the purchasers to the property in those cases was derived from the sales and payment of the purchase money; and the sheriff's deeds were only necessary as the legal evidence of such sales, in consequence of the statute of frauds. In the present case, however, it is impossible that the conveyance from Henry Franklin should convey the legal estate by relation, so as to overreach the lien of these judgments, because the decree in the chancery suit is conclusive. So far as the lien of these judgments is concerned, the legal title to the premises in controversy never vested in the fraudulent grantee of A. and J. Franklin, but remained in themselves.

It was urged upon the argument, as a reason why these vendees should be permitted to pay the money, and take a conveyance from Henry Franklin, as the ostensible owner, pending the chancery suit, that it was impossible to protect themselves against the payment of the purchase money in the mean time. But if a judgment in this state is to be considered a legal as well as an equitable lien upon lands contracted to be sold, to the extent of the unpaid purchase money, as I think it is, I see no difficulty in protecting the equitable rights of the vendee, not only against the judgment creditor, but also against the vendor. If the judgment creditor proceeds to enforce his lien by a sale of the land, the vendee may appear at the sale and give notice of his prior equitable rights, and the purchaser will then take the legal estate, subject to such prior equity; and if the vendee is in the actual possession of the land under his contract to purchase, even that formality will not be necessary, as the purchaser at the sheriff's sale in such a case will be chargeable with constructive notice of those rights, which in equity is equivalent to actual notice. On the other hand, if the vendor insists upon the payment of the purchase money to himself, and refuses to permit it to be applied to the extinguishment of the incumbrance upon the land, the vendee may file a bill in equity for a specific performance of the contract, making the judgment creditor as well as the vendor parties thereto, so that the pur-

chase money may be applied under the direction of the court, which will effectually protect him against the claims of both.

In the present case, a similar bill, in the nature of a bill of interpleader, might have been filed by the vendees against the judgment creditor, and also against Embree and the parties to the conveyance, which is alleged to have been fraudulent; and a payment into court, or a payment to either of the parties under the direction of the chancellor, in such suit, would have protected the rights of the vendees, and would have entitled them to a conveyance of the legal estate from the holders thereof, freed from the lien of the judgments. Such was the course recommended by Serjeant Hill in a case somewhat similar, where judgments were supposed to be an equitable lien upon the unpaid purchase money, on the sale of an equitable estate: See 4 Madd. C. R. 508, note. The case of *Bumpus v. Platner*, 1 Johns. Ch. 213, referred to by the counsel of the plaintiff in error, on the argument, only decided that a purchaser under a conveyance with warranty, but who had not been disturbed in his possession, could not be discharged from the payment of the purchase money on the ground of an alleged defect of title in his vendor. But even in a case of that kind, where the vendee was actually prosecuted by persons claiming a paramount title, Chancellor Kent enjoined the vendor from collecting the purchase money until the rights of the parties could be determined: *Johnson v. Gere*, 2 Johns. Ch. 546. Here the vendees were in equity bound to pay the purchase money for the two thirds of these lots to one or the other of two parties, both claiming a right to the same under S. Franklin, the vendor; and until that controversy was determined, the vendees could not safely pay it to either. It was therefore a very proper case for a bill of interpleader, or rather a bill in the nature of a bill of interpleader, to settle the right to the unpaid purchase money, and for the transfer of the legal estate to the vendee: See *Bedell v. Hoffman et al.*, 2 Paige Ch. 199; and as Embree, the survivor of S. Franklin, could at law have recovered the whole of the unpaid purchase money under the contracts, he would have been a proper party to such a bill.

The necessity of a resort to such a proceeding would unquestionably be very inconvenient and troublesome to the vendees. But it is one of the ordinary consequences of a contract for the purchase of real estate without paying over the purchase money immediately, and without obtaining a conveyance of the legal estate free from prior incumbrances. The case of the plaintiff

in error is still harder here if he is chargeable with constructive notice of the rights of the judgment creditors by the pendency of the chancery suit. As there is no doubt that the purchase money was paid over to the attorney of Embree and Henry Franklin in good faith, with no actual knowledge on the part of the vendees of the pendency of that suit, and with no suspicion that the conveyance from J. and A. Franklin was fraudulent, I proceed to consider the question as to effect of the chancery suit upon the subsequently acquired rights of the vendees under the deed from Henry Franklin.

The vendees of S. Franklin and Embree were not necessary parties to the chancery suit, as it was not sought by that suit to deprive them of any legal or equitable rights they had then acquired under their contracts. The whole object of that suit was to set aside the fraudulent deed to H. Franklin, which prevented the complainant from enforcing his judgment against J. and A. Franklin's interest in the premises, of course subject to the equitable rights of these vendees as they existed at the commencement of that suit. And I see nothing to prevent the plaintiff in error from enforcing those equitable rights, by a resort to a proper tribunal, at this time, even if the present judgment should be affirmed, as those equitable rights are not in any way affected by the decree.

The principle is as old as the court of chancery itself, that the commencement of a suit there, which is duly prosecuted in good faith, and followed by a decree, is constructive notice to every person who acquires an interest from the defendant in the subject-matter of the suit *pendente lite*, of the legal and equitable rights of the complainant as charged in the bill and established by the decree. Chancellor Kent has examined this subject so fully, in the case of *Murray v. Ballou*, 1 Johns. Ch. 566, that it would be a useless waste of time to cite any other authorities than those he has there referred to, in support of this general principle. I may also add, that although this principle may sometimes operate harshly upon a purchaser who has no actual notice of the pending litigation, it seems to be essential to the due administration of justice. Hence it is, that the legislature have not deemed it wise to abolish the principle, although they have modified its use in a certain class of cases, by requiring a notice of the pendency of the suit to be filed in the clerk's office of the county where the lands in controversy are situated: 2 Rev. Stat. 174, sec. 43. But even this, like other constructive notices which have been found essential for the preservation of the legal

and equitable rights of one party, will not always convey actual notice to others of the existence of those rights. It is certainly more convenient for most purchasers to search in the clerk's office of the county where the lands lie, to ascertain the existence of a chancery suit affecting those lands, than to be obliged to resort to the files of the court for that purpose; and probably the legislature would do an essential service to that class of community which stands most in need of such protection, if a law should be passed requiring every creditor who wishes to preserve a lien upon lands by the operation of a judgment or decree, to cause a transcript or copy of the docketing thereof to be filed, or entered in the clerk's office of the county where such lands are situated. It is the duty of courts of justice, however, to administer the law as they find it; and the rights of these parties must be determined by the law as it existed at the time of the conveyances to Rowley and Boughton in November, 1810, and June, 1811.

It was insisted in this case, that the vendees were not chargeable with notice of the rights of the complainant, and the nature of the litigation, because the premises in question were not sufficiently described in the bill as one of the subjects of litigation in that suit. It might be a sufficient answer to this objection to say, there was sufficient in the bill to put a purchaser upon inquiry, which, in equity, is considered good constructive notice of the fact. In ancient times, when the complainant was permitted to take out and serve a subpoena before the filing of his bill, it was even doubted whether the purchaser was not chargeable with constructive notice of the complainant's rights, and of the object of the suit, from the time of the service of the subpoena, provided a bill was afterwards filed and prosecuted to a decree: Sugd. Law of Vend., 8 Lond. ed. 745; *Pigott v. Nower*, 3 Swanst. 535, note; *Anon.*, 1 Vern. 318. In the present case, however, I think there was sufficient on the face of the bill to enable Rowley and Boughton to understand the rights claimed by the complainant, and the nature of that litigation, so far at least as to satisfy them that they could not safely pay the balance of the purchase money to Henry Franklin, and take a conveyance from him for the premises now in controversy, pending that suit.

A purchaser is always supposed to be cognizant of the contents of the conveyance under which his grantor derived his title to the premises; and if the purchaser can not make out his title, except through a deed which leads him to another

fact, either by description of the parties, recital, or otherwise, he will be deemed cognizant thereof: Sugd. Law of Vend. 756; Eden Ch. 356, note a. Here the purchasers, *pendente lite*, were about to pay the purchase money to Henry Franklin, and to take a title from him as the assignee of two thirds of the premises which belonged to Samuel Franklin at the time of his death. They would, of course, look to this deed from J. and A. Franklin, which was then on record in the clerk's office of the county of Ontario, and which bore date on the twenty-ninth of March, 1808. They would then look to the will of S. Franklin, under which the grantors in that deed derived title in September, 1807.

Then, by examining the complainant's bill in chancery, they would have found, among other things, that the Franklins stopped payment in December, 1807, being then indebted to the complainant and others to a very large amount; and being at that time also possessed of a large personal estate, and of a considerable amount of real estate, a part of which had been previously mortgaged to Cornelius Ray and others; that John and Abraham Franklin had divested themselves of all that real and personal estate, by conveying the same in trust to their friends, without consideration, and for the sole purpose of preventing such property from being reached by judgment and execution; and that the mortgaged premises, and divers lots in the city of New York in particular, had been conveyed to Henry Franklin. They would also have found that by such bill the complainant asked for a discovery as to the whole or any part of the real estate which had been conveyed to H. Franklin, or others, after the failure, and to whom in particular the same had been thus conveyed. That the complainant prayed that all the real and personal estate which had been conveyed by J. and A. Franklin, after they so stopped payment, might be applied to the payment of his demands. That he also prayed that all such grants, conveyances, and transfers might be decreed to be delivered up and canceled; that he might be permitted to redeem the mortgaged premises, and that he might have such other and further relief as the case made by his bill entitled him to ask of the court. By thus comparing these allegations in the bill, and the prayer thereof, with the date of the deed under which they were about to take title from Henry Franklin, the persons holding these contracts would have seen that the lands mentioned in that deed must be a part of the lands which, by the bill, were charged to have been thus fraudulently conveyed by J. and A.

Franklin to some of their friends, after their failure, and for the purpose of protecting it from the judgments and executions of their creditors; and consequently, that this conveyance to H. Franklin was fraudulent and void, as against the complainant's judgments, and might be set aside by the decree of the court in that suit.

I am satisfied, therefore, that they are legally chargeable with constructive notice of the pendency and object of the chancery suit, so far as it could affect these two lots. The conveyances from Henry Franklin to them, and their subsequent conveyances to Parks, were therefore void, so far as regards the lien of Hendricks' judgments upon the legal interest of J. and A. Franklin in the two undivided third parts of those lots. If, then, there are no other difficulties in the way, the lessor of the plaintiff was entitled to a judgment on the special verdict for that portion of the premises.

There is no foundation for the supposition that the rights of the lessor of the plaintiff were barred by the statute of limitations at the time of the commencement of this suit, in 1829. Where a vendee goes into possession of land under a contract to purchase, he becomes a tenant at will to the vendor, and his possession can never be adverse to that of his landlord, or his assigns, or legal representatives, while he is in possession and claiming to hold under such contracts. This was the situation of the vendees in the present case, at least until they attempted to obtain title under the conveyances of Henry Franklin, and that was within twenty years of the time of the commencement of this suit. If the whole purchase money had been due more than twenty years, and there was no evidence of the existence of the debts during that period, probably the jury might presume payment of the purchase money, and might also presume a conveyance of the lands to the purchasers, in conformity with the original agreements. Such presumption, however, could not be made in this case, because the last payment on Boughton's contract did not become due until 1811, and it is expressly found by the jury that nothing had been paid on Rowley's contract at the time of the conveyance by Franklin and Embree to him, in November, 1810.

I am also inclined to think that there was not such an adverse holding of the premises by Parks, in July, 1826, as to render the partition deed of that date void or inoperative, as it respects Tibbits' interest in these lands under the sheriff's deeds. All the conveyances subsequent to the date of the contracts being

rendered absolutely void, as against the lien of the judgments, by the operation of the *lis pendens* and the decree of the court of chancery, and the sheriff's deed having relation back to the date of the judgments, Parks must be deemed to have entered under Rowley and Boughton as the assignee of their equitable interests in these contracts. I think the legal effect of all these proceedings was to constitute Parks a tenant at will to Hendricks and Tibbits, as the purchasers of the legal estate of the devisees of S. Franklin, under the judgments against such devisees. The reasons upon which the statute prohibiting the sale of lands held adversely, is founded, do not appear to be applicable to the case of an occupant who holds in such a manner that he is bound to surrender his possession to the vendee, without questioning his legal title thereto; and where such vendee takes his conveyance on such sale, subject to all the equitable claims of such occupant, *cessante ratione legis, cessat ipse lex*.

Upon the legal merits of this case, therefore, and considering that the equitable rights of these parties can not be decided in an ejectment suit, I must vote for an affirmance of the judgment of the supreme court. If Parks is compelled to resort to the court of chancery to protect his equitable rights, where alone they can be protected agreeably to the settled law of the land, there will be no difficulty in administering justice between these parties in reference to their respective equitable rights.

SEWARD, Senator. After a careful examination of the several points discussed in the argument of this cause, I have come to the conclusion that the judgment of this court must depend upon the question whether the principle of *lis pendens* applies, so as to avoid the deeds executed by Henry Franklin.

The supreme court, in delivering their opinion in this cause, seem to have considered themselves concluded by their previous judgment in the cause of *Jackson, on the demise of the same lessor, v. Andrews*, 7 Wend. 152 [22 Am. Dec. 574]. A manifest distinction, however, appears between the two cases as reported. In that case an entire purchase was made during the pendency of the suit in chancery, while in this case it appears that long before the bill in chancery was filed, or the frauds complained of were committed, the persons under whom the plaintiff in error holds, had made contracts with the true and undisputed owner of the premises, had entered into the possession thereof, and had made improvements thereon, and the deeds subsequently executed *pendente lite* by Henry Franklin, who had the legal title, were in compliance with these contracts.

The supreme court notice these facts, but say that the same state of facts was presented in the case of *Jackson v. Andrews*, although they are not mentioned in the report of that case. It was suggested on the argument, that the supreme court were incorrect, in point of fact, in this statement, and that it appeared, in the case of *Jackson v. Andrews*, that no contracts had been executed prior to the commencement of the suit in chancery. However this may be, certain it is, that the question presented in this cause was not discussed in the case of *Jackson v. Andrews*, and does not appear to have been deliberately examined in this case. I have alluded to that case for the purpose of explicitly stating that while I can not sustain the judgment in this cause, I see no necessity of disturbing the judgment pronounced in that, as the case stands reported.

The rule of *lis pendens*, although well settled, is in all the reported cases admitted to be harsh, and justifiable only on the ground that individual rights must sometimes be made to yield to rules established for general convenience. I may add, that general and well established as the rule is, it is not without exceptions—exceptions arising from the very excess of hardship, as applied to cases of peculiar character. Chancellor Kent, in his luminous opinion in the case of *Murray v. Lyburn*, 2 Johns. Ch. 444, laid down the rule and enforced it in the strong language of the lord chancellor in Ireland: 2 Ball. & B. 167: “The rule of this court undoubtedly is, that any interest acquired in the subject-matter of a suit pending the suit, is so far considered a nullity that it can not avail against the plaintiff’s title; and if this rule were not attended to, there would be no end of any suit; the justice of this court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. It is extremely difficult to draw any line, and very dangerous to allow of the rule being filtered away by exceptions.” “Nevertheless,” continues Chancellor Kent, “I am not prepared to say the rule is to be carried so far as to affect commercial transactions. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce.” In my judgment, the application of the rule, in a case like the present, would be unjust, and could be sustained upon no grounds of necessity or general convenience.

It is but a few years since the greater part of the whole territory of this state was in a wild and uncultivated condition, and of comparatively very small value. Large tracts of lands

still remain in the same condition. The history of the state and of the whole country shows that the only manner in which this wilderness was thus far reclaimed, was by the purchase of small quantities of land by contracts preliminary and conditional, by virtue of which the purchaser entered into possession, proceeded to erect his dwelling, gradually removed the forest, and derived from the soil itself the means of paying the purchase money. Thus, by performing his contract, he secured to himself the legal title of the land, of which, from the moment he entered into possession, he was regarded as the owner, subject to the liability of eviction on failure to perform his contract; and with some reason was he so regarded, for long before the expiration of his contract, by the investment of his labor and his improvements, the land was enhanced in value, sometime quadruple, and sometimes ten-fold, beyond the contract price. Hence it was that there were sales of what are called these "improvements," which sales, in the estimation of the contracting parties at least, were something more than the mere assignment of contracts or choses in action, securing upon condition the title of wild land. This mode of tenancy and purchase of land is new and peculiar to a country where exigencies are such as ours. It has no precedent in the legal history of that country whence the rule of *lis pendens* and our whole jurisprudence was derived—a country where, instead of inviting and encouraging the alienation of lands and the subdivision of estates, the policy of government has always been, and still is, to confine the rights and immunities arising from the proprietorship of real estates to a favored few. To extend to these pioneers of civilization the rule of *lis pendens*, so as to deprive them of property thus honestly and painfully acquired by years of persevering industry and self-denial, may in some cases be necessary for general convenience; but where that necessity is not absolute, and that convenience not most obvious, and where discretion is left to me by the absence of authority, it will require, to induce my consent to the application of the rule, an argument more eloquent even than that of the distinguished jurist who has so ably explained and defended it in the case of *Murray v. Lyburn*.

I proceed to examine whether such an application of the rule is necessary; or whether a discretion is left to us in regard to the case now before the court; and I remark, in the first place, that we have the highest authority for considering the rule as not an arbitrary one, which must continue to be applied in all

cases, although the reasons for its original exist. So this court decided in the case of *Hopkins v. Lyburn*, 4 Cow. 678. The reason of the rule in the *Murray v. Lyburn*, before cited, is admitted were not applied, "there would be no end to art of the court would be evaded, and great inconvenience to the suitor would necessarily be introduced in the case of *Murray v. Ballou*, 1 Johns. Ch. 577, says, in assigning the reasons of the rule, "every purchaser the charge of actual notice of the very nature of the case, be in a great degree. The only safe and efficient means of preventing injustice, is to charge the purchaser with dealing in the case of *Hopkins v. McLaren*, before cited, states the reason of the rule to be, that "if a pending a suit were to be allowed to affect the would be no end to litigation; for as soon as brought in, he might transfer to another, and to bring that other before the court, so that a terminable." That such is the true reason of questioned in the argument of this cause, not in the books, and is therefore here assumed. advanced thus far in the consideration of the ascertained what is the true reason of the not necessary to be applied where that reason authority last cited (Colden's opinion in the *McLaren*), adds: "This reason has no application to a person whose interest subsisted before the suit and who might have been made an original party."

Assuming the principle here asserted, it shows that the persons in possession of the land, by virtue of the contracts for purchase at the commencement of the suit in chancery, had an interest that they might have been made parties. The possession of land, even the naked title or pretense of title, is a subsisting interest in the view of the law. In the absence of a right of possession in a plaintiff, the possession of a defendant is a good defense, although the title belongs to another person. So no person can be evicted from land, by the judgment or decree of any court, if he was not made a party, if in possession at the commencement of the suit. And why? Be-

terest, and shall have a day in court to assert it. What I have thus far said is by way of illustration, and to support the proposition, that if the tenant had any interest at the time of the commencement of the suit, which it is sought to affect by such decree or judgment, and if the nature of the suit is such that he can be a party, such interest shall not be affected unless he be made a party. Let us now inquire what was the situation of the tenants in possession, at the time Hendricks filed his bill in chancery; what was their interest, and what were their rights, and how it is contended they are affected by the decree of the court of chancery.

This inquiry may enable us to determine the important question whether they ought to have been made parties. They had, several years before the bill was filed, made contracts with the true owner for the purchase of the premises in question, by which contracts they were authorized to enter into possession, and had entered immediately, and were in possession at the commencement of the suit. By those contracts they had been bound to pay the purchase money in installments of different sums, through a series of years, which had not expired when the suit was commenced; in the one case a new contract had been executed in continuance of the first, and a part of the purchase money actually paid; in both cases the tenants were bound by the contracts to make an actual settlement upon the premises, and build a dwelling-house thereon, within three years from the date of the contracts. This latter condition had been performed, but in both cases there had been default suffered by failure to make the payments according to the terms of the contracts. Such was the situation of the tenants. What were their rights and interests? As against Henry Franklin, who had now become possessed of the legal title, the right to perform their contracts and to demand deeds for the premises, and in case of his refusal, then to a decree for specific performance. It is unnecessary here to go into a critical examination of the cases in which equity would decree a specific performance.

The part performance of the contract, the making of improvements with the knowledge of the vendor, which I think, in this case, we may presume, are always prominent grounds to entitle the purchaser to this relief; and it is well settled that failure to make payments at the day is not in such cases a material objection. But it is not the rights which they could have enforced, as against Henry Franklin, so much as their rights which they

could, by virtue of their contracts and in performance of them, acquire against the complainant in the chancery suit, which, it seems to me, ought principally to be regarded in this view of the case. What was the situation relative to him? In possession of the land by contract from the true owner, bound to perform their contract with Henry Franklin, who had become seised of the legal title, they had a right to do what they were legally bound to perform, that is, to pay the amount due on their contracts, and receive deeds which would pass the legal title. On the other hand, the complainant, in relation to them and Henry Franklin, stood challenging the title of Henry Franklin as fraudulently obtained, denying his right to receive the purchase money and the validity of a deed executed by him; not, however, impeaching the original contracts, but admitting the validity and claiming only the right to be substituted in the place of Henry Franklin, under all the legal obligations devolved upon him, and entitled to all the legal advantages resulting to him in relation to the tenants by those contracts. Such were the relative situations of these parties at the time of the commencement of the suit. I understand it to be conceded that the decree of the court of chancery in that suit can affect no legal or equitable interests of the tenants existing at the time of its commencement, inasmuch as they were not parties; and it is insisted, that by the application of the doctrine of *lis pendens*, no such interest is affected. Is this position just? Are not the rights of the tenants affected by the application?

The complainant in that suit, now holding the chancellor's decree, says to the tenants: "It is true, you had a right to perform your contracts with Henry Franklin; you had a right to pay the purchase money, and to take a legal title for the lands, in pursuance of the contracts; you had even a right to compel a specific performance of the contracts; but by the force of this decree, your rights thus perfected are unavailing; your money thus paid is paid in vain; your deeds thus obtained are a nullity; and the specific performance thus voluntarily made by Franklin, leaves you in the same state as if it had not been conceded or coerced." It is true, he admits, that he is substituted for Henry Franklin, and that if they were entitled to a specific performance against Franklin, they are still so entitled as against him, and should have filed, or may yet file, their bill against him. But is it not solemn mockery, to say that their rights and interests, as they existed at the time of the commencement of the suit, have not been affected, when in the very manner pre-

scribed by the contracts, they have paid to Henry Franklin the whole purchase money, and obtained his title, which, but for the decree in chancery, would be a good title for the premises? It appears, then, that the tenants had, at the time of the commencement of the suit, a subsisting, though inchoate right in the premises, which, if the rule of *lis pendens* be applied to them, has been affected by the decree so far that their right, thus inchoate, when perfected during the pendency of the suit, has been perfected in vain, and they are at law absolutely divested of their entire interest in the premises, although, but for the effect of the *lis pendens*, their title, acquired by virtue of and in pursuance of their previous contracts, would be absolute.

And now let us next see how far the reason of the rule of *lis pendens* applies, so as to justify this admitted hardship. That reason is the convenience of suitors, and the impracticability of making every person a party to a suit who may purchase or obtain an interest in the subject-matter *pendente lite*. But was there any inconvenience in making these tenants parties when the suit was commenced? Was not their possession notorious; and is it not a well-settled principle of law, that possession of land is notice to all the world, requiring those who would concern themselves in it, or litigate for it, to take notice, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor? Is it not far more equitable and just to require the complainant thus to take notice of such an obvious, notorious interest, than to hold the humble tenant, located in the woods in the extreme western part of the state, to search the office of the register or assistant register in chancery, at Albany or New York, every time an installment becomes due on his contract, to see if peradventure a bill may not have been filed by some creditor, heir, or devisee, which may by possibility involve the vendor's title?

The reason of the rule is, to subject persons who intrude into controversies litigated in the courts, to the peril of the litigation. But who has intruded here? Who claims an interest in the premises now that was not claiming; aye, openly, notoriously, and in the face of the world, claiming when the suit in chancery was commenced, and in possession, too, under his claim? Is such a person, thus situated, to be treated as an adventurer, an intruder into litigation? I am sure that he can not morally, and I think I shall be able to show he ought not legally to be so regarded. It remains yet to be proven that the

interest of the tenants was such that they might have been made parties to the suit in chancery.

It was forcibly urged in the argument, and scarcely answered to my satisfaction, that the tenants could not have been made parties to the chancery suit, because there had been no sale on the complainant's execution; and until such sale, it could not be known that the execution would not be satisfied out of personal property of the defendant, or of other real estate of Henry Franklin or the other defendants. But, on mature reflection, I am convinced that a bill could have been framed (and if it could have been, then it was the duty of the complainant so to have framed his, if he would have the advantage of it) so as to meet the exigencies of this very case. It would only have been necessary, as the court of chancery has power not only to pronounce decrees, so as to render judgment for the immediate accomplishment of justice, but is clothed with ample powers for the prevention of injustice and prospective accomplishment of justice, to set forth, in addition to the facts contained in the complainant's bill, that it was doubtful whether, out of the other lands which were bound or might be bound by the judgment of the complainant, his execution could be satisfied. Let us suppose (and the supposition is pertinent) that the lands now in litigation were all the lands in question in the chancery suit. The objection I have adverted to would not then exist; and would it in that case be pretended that the bill would not be properly framed, if it charged the making of the contracts by Samuel Franklin, the possession and part performance by the tenants, the fraudulent alienation by the devisees of Samuel Franklin to Henry Franklin, and prayed *ad interim* an injunction against Henry Franklin to restrain him from receiving, and the purchasers from paying the purchase moneys; that the moneys due on the contracts, if paid, should be paid into court; and if not paid, that the lands should be sold on execution, and for relief generally; besides, it seems to me that it ought not to be allowed to the defendant in error, the complainant in the chancery suit, while insisting upon the effect of the decree, as indirectly avoiding the rights of the tenants acquired in pursuance and by performance of these contracts, to say, that he could not, by making them parties, have entitled himself directly to the same relief.

I have next to observe, that, although I am satisfied the defendant in error might properly, and therefore ought to have made the tenants parties to the chancery suit, it does not ap-

pear to me that the case necessarily turns upon that point. The complainant below filed his bill to set aside a fraudulent conveyance. Having succeeded in obtaining a decree by which that conveyance was set aside, he brings his action of ejectment against the tenants holding under a conveyance from the fraudulent grantee. They could defend only as *bona fide* purchasers, and every act done by them to perfect a title, after notice of the fraud, would have been affected and invalidated by the fraud. Had the complainant, when he neglected to make the tenants parties, given them actual notice of the fraud alleged, they would have proceeded at their peril in the further performance of their contracts. In the view I have taken of the question, whether the tenants ought to have been made parties, I am met by the objection, that if, instead of a suit in chancery, there had been an action at law in which the question of fraud had been tried, then the tenants, from the nature of the action, could have been made parties. This objection needs no other answer than that, in order to take this case out of the rule of *lis pendens*, it is only necessary that the persons sought to be affected by the decree, should have had a subsisting interest in the premises, and might have been made parties in the suit; all which, I trust, I have satisfactorily established. I consider myself well supported in the view I have taken of this case, by the circumstance that I have not found, nor has there been shown to the court, a solitary case in which the rule of *lis pendens* has been applied to a person who purchases by contract, and enters into possession, and in part performs his contract before suit commenced, and then, *pendente lite*, without actual notice, fulfills his contract, and takes a deed for the land.

In the case of *Murray & Winter v. Ballou & Hunt*, before cited, the entire contract and purchase were made after the suit was commenced, the defendants having had no previous tenancy of or interest in the premises. The facts were in this respect similar in the case of *The same complainants v. Lyburn and others*, 2 Johns. Ch. 441. So, also, in the case of *Martin v. Styles*, 11 Ves. 200,¹ the case of *Culpepper v. Austin*, 2 Ch. Cas. 221, and the several cases in *Vernon*, cited by Chancellor Kent in *Murray & Winter v. Ballou & Hunt*. The same observation applies to the case of *Jackson v. Ketchum*, 8 Johns. 479. In this country, then, the question, which owing to circumstances before cited, being one of immense importance, is new. In England such a case is not likely to have occurred, as

¹ *Style v. Martin*, 11 Ves. 200, n.; S. C., 1 Ch. Cas. 180.

contracts similar to those presented in this case not altogether unknown in that country, where during an executory contract, generally remains void. In accordance with the view I have taken of the spirit of the statute requiring a notice of the chancery suits to be filed in the county clerk's office, I rejoice, that owing to the provisions of that statute, this severe hardship can seldom arise in future, consistent with all past adjudications on this subject, that the rule of *lis pendens* is not applicable to the consideration. I am therefore of opinion that the decision of the supreme court should be reversed.

Should it become necessary, in the opinion of the court to pass upon the validity of the deed executed by the defendant in Ontario, on the judgment against John Franklin, I am of opinion that it was void, because on its face it appeared to have been executed before the expiration of the time allowed by the statute for the redemption of the premises. Until the expiration of that time, the sheriff has no power to execute the deed, although in the case of a private individual, a deed so executed would convey a title subsequently to the expiration of that time. The sheriff is without warrant for saying that a deed, executed by a public officer without authority, shall take effect as if it had been executed with that authority may happen to be devolved upon the court.

On the question being put, Shall this judgment be affirmed? all the members of the court (twenty in number) except the chancellor, voted in the affirmative, the chancellor voting in the negative.

Whereupon the judgment of the supreme court is affirmed, with costs, and directions given that judgment be entered for the defendant, with costs to be paid by the lessor of the plaintiff.

LIS PENDENS, DOCTRINE OF, is discussed in the note to *Manly v. Manly*, 14 Am. Dec. 774; see, also, *Murray v. Blatchford*, 16 Am. Dec. 774; *Rives*, 15 Id. 756; *Henderson v. Pickett's Heirs*, 16 Id. 1; *Shaw*, 23 Id. 183. The principal case is referred to as an authority to who are to be deemed to be notified by a *lis pendens*, in *Paige Ch.* 189; *Griswold v. Miller*, 15 Barb. 522; *Chapman*, 128; *Earl v. Campbell*, 14 How. Pr. 332; *Craig v. Ward*, 238; S. C., 3 Keyes, 391; *Hovey v. Hill*, 3 Lans. 170; *Bennett*, 361; S. C., 6 N. Y. Sup. Ct. (T. & C.) 604; *Trustees v. Wheeler*, 59 Barb. 599, 611.

NOTICE—WHATEVER PUTS A PARTY UPON INQUIRY in relation to a claim, which may be ascertained by ordinary diligence: *Lodge v.*

Dec. 36, and note; *Booth v. Barnum*, Id. 339; *Tuttle v. Jackson*, 21 Id. 306, and note.

POSSESSION AS NOTICE.—See the note to *Ludlow v. Gill*, 1 Am. Dec. 695; see, also, *Knox v. Thompson*, 13 Id. 246, and note; *Scott v. Gallagher*, 16 Id. 508, and note; *Prichard v. Brown*, 17 Id. 431; *Tuttle v. Jackson*, 21 Id. 306, and note; *Grimstone v. Carter*, 24 Id. 230.

NOTICE TO PURCHASER AT SHERIFF'S SALE, WHAT IS: *Barnes v. McClinton*, 23 Am. Dec. 62.

PURCHASER UNDER EXECUTORY CONTRACT, RIGHTS OF.—The principal case is referred to as authority on the following points under this head: That a vendee, under a prior contract, making payment to the vendor after the recovery of a judgment against the latter, but without actual notice, will be protected: *Moyer v. Hinman*, 13 N. Y. 185. As to the extent of the lien of a judgment against the vendor, as respects a purchaser under an executory contract: *Moyer v. Hinman*, 17 Barb. 139; *Smith v. Gage*, 41 Id. 71. As to when a purchaser under an executory contract is bound by *lis pendens*, and when not: *Earl v. Campbell*, 14 How. Pr. 332; *Trustees of Union College v. Wheeler*, 59 Barb. 599, 611. Generally, as to the rights of such purchasers: *Clark v. Jacobs*, 58 How. Pr. 521. That a deed pursuant to a previous contract takes effect by relation: *Thurman v. Anderson*, 30 Barb. 624. That a vendee under an executory contract will be protected against all persons, except those becoming purchasers or incumbrancers *bona fide* and without notice: *Chase v. Peck*, 21 N. Y. 585. The principal case is also cited in *Wood v. Chapin*, 13 Id. 525, and *Maltonner v. Dimmick*, 4 Barb. 570.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HOKE v. HENDERSON.

[4 DEVEREUX'S LAW, 1.]

IN CONSTRUING A STATUTE, if the words are ambiguous, resort should be had to the probable consequences which would arise from the one or the other construction.

IDEM.—But if the meaning of the language of the statute be plain, there can be no such resort.

IT IS WITHIN THE PROVINCE OF THE JUDICIARY to declare an act of the legislature void for unconstitutionality.

AN ACT OF THE LEGISLATURE WILL BE DECLARED UNCONSTITUTIONAL ONLY, in the case that its repugnance to the constitution be beyond reasonable doubt.

AN ACT IS UNCONSTITUTIONAL AS AN ASSUMPTION OF JUDICIAL POWER, if it professes to decide between adverse claims of right, or if it declares that an existing right of property shall cease.

SUCH AN ACT WILL NOT BE REDEEMED because others, of the objects sought to be attained, are within the legitimate powers of the legislature.

AN ACT OF THE LEGISLATURE IS NOT A "LAW OF THE LAND" if its effect, if valid, would be to deprive a citizen of a right of property, or inflict on him punishment without previous trial had before the judicial tribunals.

THE LEGISLATURE MAY ENACT what laws to them seem meet, upon all subjects wherein not restrained by the constitution.

A PUBLIC OFFICE IS THE PROPERTY OF THE INCUMBENT, subject, however, to legislative control in all that concerns the interest of the community, and the legislature may therefore increase the duties, diminish the emoluments, or even abolish the office.

IDEM.—But the legislature can not, while leaving the office in existence, lessen the tenure by which the incumbent holds, nor can it, during the term for which the incumbent holds, transfer the office to another.

BUT WHERE THE OFFICE IS NEITHER LUCRATIVE NOR HONORARY, but is only established for the public weal, there the incumbents may be discharged and their duties transferred to others, at the pleasure of the legislature.

APPEAL from the Lincoln circuit. The act of 1832, referred to in the opinion, was entitled: "An act to vest the right of electing the clerks of the county and superior courts in the several counties within this state in the free white men thereof." It provided that, at the next election for members of the general assembly, there should be an election for the above-named officers, what bonds should be given by those elected, who should be eligible, who should have a right to vote in such election, etc.

Iredell and Devereux, for the plaintiff.

Badger, *contra*.

RUFFIN, C. J. The office of clerk of the superior court of law for Lincoln county is claimed by Mr. Hoke, by virtue of his election thereto, under the act of 1832, c. 2; and his admission is opposed by Mr. Henderson, who claims the same office by virtue of a previous appointment thereto under the act of 1806. The title depends upon the construction and validity of the act of 1832.

The decision in the superior court was in favor of the old clerk, and is rested by the judge who pronounced it distinctly upon the ground that the act is unconstitutional, and therefore void.

In support of the decision it has, however, been contended here, that it is not necessary, for the purpose of this controversy, to pass upon the correctness of the reasons of the judge of the superior court; for that the act does not in terms, and according to a proper construction, oust the defendant from office.

It is true the act does not immediately vacate the offices which were filled at its passage; nor does it expressly remove the incumbents upon the future elections to be had under its provisions. The question is, whether that effect arises from the necessary or fair construction of those provisions taken together? In construing an instrument, the cardinal point is to ascertain the meaning of those who speak in it, from the words used by them, and the objects apparently to be effected. This is the rule for the construction of statutes as well as other instruments, and it is the duty of the court, to whose province it falls, according to the distribution of the powers of government in this country, to interpret statutes, to put a fair meaning upon the language of the legislature, in order to effect, as far as they are constitutionally allowable, the ends in view. If the words are ambiguous, and the evils to be remedied not apparent, or not specified, and the remedy not plainly designated, the effects

and consequences of the one construction or the other may and ought to be resorted to as important aids to the expounder.

If in one sense the enactments are reasonable, consistent with natural equity and a sound public policy; and if, in another sense, they invade private right, are retrospective in their operation in denouncing punishments for acts not before criminal, or in divesting property secured by previous laws, and the guaranty of public faith; if they are repugnant to the natural sense of justice, subversive of the principles of sound legislation, and conflict with a wholesome policy long established and sanctioned by the tests of experience and common consent; and above all, if they transcend the limits of the legislative authority as defined by the constitution—a court in such a case would not only be warranted but bound to receive the former, and not the latter, as the true meaning of the legislature, and to execute the act as thus interpreted. A decent respect for the legislature, and a knowledge of the imperfection of language, and of the difficulty of expressing the meaning in such exact terms as to convey it with precision to the mind of another, would impose on the court the presumption, as an irresistible one, that general phrases of dubious import were not used in the harsh sense attributed to them, to destroy existing rights, but in the milder one of which they are susceptible, of regulating the future actions of the citizen, and prescribing a new rule for the subsequent acquisition or enjoyment of property.

These considerations would induce the court cheerfully to adopt the construction of the act contended for by the counsel for the defendant, were there nothing more in it than those parts on which he has animadverted. But there are other provisions which are absolutely inconsistent with this construction. To mention a few will be sufficient, since they are decisive. The first section enacts, that the sheriff, and all persons holding elections, at the next election for members of the general assembly, shall also hold an election for county and superior court clerks, in the same manner, and under the same rules and regulations, that they receive votes for members of the legislature. The fourth section enacts, that the clerks thus elected shall, at the first term of their respective courts which shall happen after their election, execute bonds for the faithful discharge of their duties, and take the oaths of office. It is thus seen that the enactment is, not that the elections thus to be held shall be from time to time thereafter in each county as a vacancy shall occur, but that a poll shall be opened at the then

next general election, by all persons holding the elections for members of assembly. Indeed, no provision is made for any future election, not even one at the end of the four years, the prescribed term of service. In the event of a vacancy after one election, the court is authorized to fill it, and the person appointed is to remain in office until the next annual election of members of the assembly, or the first term of the court of pleas and quarter sessions thereafter; but even in that case, the persons who shall have the right to vote are not designated, nor is any person authorized to receive the votes. The very imperfection of the act in making no provision for subsequent elections, proves that the great, almost the sole end of it, was an election to follow its passage almost immediately in every county in the state, as the words of the first section in themselves import.

It is, however, said, that the act does not remove the existing clerks; and it is asked when their offices become vacated—at the passage of the act at the election? at the qualification of the person elected? or at the next court? The answer is, that upon the grounds of the public service, and the silence of the act upon the subject of removals, the offices could not by construction be deemed vacated until, according to the other provisions, another officer was ready to discharge the duties, or, at least, the time had arrived for him to enter on them. But by a necessary implication, when that time should arrive, and the new clerk, whether elected by the people or appointed by the court, should have given bond and taken the oaths, the duties of the former clerk closed, and consequently his rights as recognized in the act also terminated. The admission of the new clerk is the expulsion of the old one, for both can not be in at once, each having a right to the entire thing. Thus, in every county a new clerk is to be elected and admitted in 1833; and therefore all the former clerks are then ejected. This conclusion is unavoidable, as it seems to the court; and is the more to be relied on as it accords with the general sense of the community, evinced by the elections held throughout the state under the act. In not a single county was an election omitted; nor have any scruples been before expressed that they were held in conformity to the requirements of the legislature.

In executing such a statute, a court is not at liberty to disregard or evade its mandate upon any of the grounds upon which are formed the rules for the interpretation of general terms of ambiguous import. These are rules for discovering the mean-

ing of the legislature, and not a justification for disobeying it. It is the province of the court to expound their words so as to attain to the meaning; and to that end, consequences and policy may be looked to. But when its meaning is discovered, the act, as really intended, is obligatory upon the mind, the will, and the conscience of the judge, however mischievous the policy, harsh and oppressive in its enactments on individuals, or tyrannous on the citizens generally. Those are political considerations fit to be weighed by, and to influence the legislators; but if disregarded by them, their responsibility is to their constituents, not to the courts of justice. To a court, the impolicy, the injustice, the unreasonableness, the severity, the cruelty of a statute by themselves merely, are and ought to be urged in vain. The judicial function is not adequate to the application of those principles, and is not conferred for that purpose. It consists in expounding the rules of action prescribed by the legislature; and when they are plainly expressed, or as plainly to be collected, in applying them honestly to controversies arising under them between parties, without regard to the parties or the consequences.

In the act under consideration, as far as it concerns the controversy between these parties, there is no ambiguity; the words are plain, the intention unequivocal, and the true exposition infallibly certain. We can not, under the pretense of interpretation, repeal it, and thus usurp a power never confided to us, which we can not usefully exercise, and which we do not desire.

Since the meaning of the act can not be doubted, and according to that meaning Mr. Henderson had not, but Mr. Hoke had, the right to the office of clerk at the time the judge refused to admit the latter, the ground of the decision of the superior court, as stated in the record, recurs before this court, and must now unavoidably be examined.

The act transfers the office of clerk from one of these parties to the other, without any default of the former, or any judicial sentence of removal. The question is, whether this legislative intention, as ascertained, is valid and efficacious, as being within the powers of the legislature in the constitutions of the country; or is null, as being contrary to and inconsistent with the provisions of those instruments. To the determination of this question the judicial function is competent. It involves no collateral considerations of abstract justice or political expediency. It depends upon the comparison of the intentions

and will of the people as expressed in the constitution, as the fundamental law, unalterable, except by the people themselves, with the intentions and will of the agents chosen under that instrument, to whom is confided the exercise of the powers therein delegated, or not prohibited. Such agents are all public servants in this state; and the agency is necessarily subordinate to the superior authority of the constitution, which emanated directly from the whole people. Legislative representatives may order and enact what to them may seem meet and useful, upon all subjects, and in all methods, except those on which their action is restrained by the constitution; and such order and enactment is obligatory alike on all citizens, including those who are by a public duty to execute the laws as well as those on whom they are to be executed. Courts, therefore, must enforce such enactments, for they are laws to them by the mere force of the legislative will. But when the representatives pass an act upon a subject upon which the people have said in the constitution, they shall not legislate at all, or when upon a subject on which they are allowed to legislate, they enact that to be law which the same instrument says shall not be law, then it becomes the province of those who are to expound and enforce the laws, to determine which will thus declared is the law. Neither the reasons which determined the will of the people on the one hand, nor the will of the representatives on the other, can be permitted to influence the mind of the judge upon the question, when reduced to that simple point. His task is the humbler and easier one of instituting a naked comparison between what the representatives of the people have done, with what the people themselves have said they might do or should not do; and if upon that comparison it be found that the act is without warrant in the constitution, and is inconsistent with the will of the people as there declared, the court can not execute the act, but must obey the superior law, given by the people alike to their judicial and to their legislative agents.

Although this function be in itself comparatively humble, and does not call for those high attainments required for wise legislation which, as it affects all the diversified interests of society, ought to embrace a knowledge of all of them and a just estimate of their relative importance to individual happiness and the common weal, yet the exercise of it is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation. Nor ought it to be, nor is it ever exercised, unless, upon such deliberation,

the repugnance between the legislative and constitutional enactments be clear to the court, and susceptible of being clearly understood by all. In every other case there is a presumption in favor of the general legislative authority recognized in the constitution. The court distrusts its own conclusions of an apparent conflict between the provisions of the statute and the constitution, because the former has the sanctions of the intelligence of the legislators, equal to the apprehension of the meaning of the constitution, of their equal and sincere desire, from motives of patriotism and conscientious duty, to uphold that instrument in its true sense; and of the present and temporary inclinations, at least of a majority of the citizens, which must be supposed to be known to their representatives and to be expressed by them. But even these sanctions are not sufficient to overturn the constitution, if the repugnance do really exist and is plain. For although the imputation is altogether inadmissible that the legislature intend willfully to violate the constitution, and still less that the people themselves contemplate violence to the instrument consecrated by their own voices and the consent of our ancestors, yet all men are fallible, and in the dispatch of business, the heat of controversy, and the wish to effect a particular end, may inadvertently omit to scrutinize their powers, and adopt means adequate, indeed, to the end, but beyond those powers. It ought not to surprise that such an event should sometimes happen. In other countries, such has been the practical difficulty of limiting the action of those in whose hands the powers of government are, that the effort to do so has been tacitly yielded up, and the will of the governors, for the time being, admitted to be the supreme law.

In America, written constitutions, conferring and dividing the powers of government, and restraining the actions of those in authority for the time being, have been established as securities of public liberty and private right. Still the agency of men is necessary to the operation of the government and the execution of its powers. The same frailties which cause men in power, through which they happen in those countries where their own judgment and conscience are their only guides and restraints, to enact laws unjust or oppressive, may here also be expected sometimes to have the same effects, although their acts should involve a violation of the constitution. It is astonishing that it does not oftener happen. That it does not, is a proof not only of the essential value of written constitutions, but of the profound wisdom with which, in ours, the powers of government

are distributed; so as to secure in every department the agency of public servants not only capable of comprehending, but so solicitous of obeying the constitution in its true spirit, that they will not palpably violate it, nor incur the danger of doing so by the exercise of doubtful powers. Such praise is not only due to the constitution for its wisdom, but the merit of scrupulously observing it must be allowed to those who have been called to legislate under it, and have not, in the whole course of the legislation of nearly sixty years, been urged by passion or betrayed by carelessness into the adoption of perhaps half a dozen acts incompatible with it. When, unfortunately, such instances do occur, the preservation of the integrity of the constitution is confided by the people, as a sacred deposit, to the judiciary. In the discharge of that duty the approbation of the legislature itself is to be anticipated; for the principle of virtue which restrains them from a known and willful violation of it, will induce them to rejoice at the rescue of the constitution from their own incautious and involuntary infraction of it. It remains now to inquire whether the act under consideration be of that character.

The office of clerk is recognized in the constitution; but the tenure is not prescribed in any part of that instrument, and is doubtless within the discretion of the legislature. Very soon after the adoption of the constitution, the act of 1777 (Rev. c. 115), for the establishment of courts of law, passed and provided that the courts should appoint clerks of skill and probity, who should execute official bonds and take certain oaths of office; and enacts, in the fourth section, that the clerks so appointed shall hold their offices during their good behavior therein. In 1806, a new law passed, which established a superior court of law and a court of equity in each county, and provided that the judges should appoint clerks, and clerks and masters in equity, of skill and probity, for the courts thereby established, who should be residents of the county at the passage of the act, and should continue to reside within the same during their continuance in office, and be subject to the same rules, regulations, and penalties, as the clerks, and clerks and masters of the courts before established. Under this law, the defendant was, in April, 1807, appointed. The legal tenure of his office is therefore that created by the act of 1777, during his good behavior therein, and as additionally qualified by the act of 1806, during his residence in the county of Lincoln. He has not been found guilty of any misdemeanor in office, but has dis-

charged its duties faithfully, and it is not stated that he has removed from the county, but that he was qualified, and therefore still resides there. The act of 1832 removes him from office and confers it on the applicant.

The great object of society is to enable men to appropriate among themselves the things which in their natural state were common. The purpose of the ordinary laws instituted by society, is to protect the right to the things thus appropriated to one individual, from the acts and wrongs of other individuals. The right is yet exposed to the action of the mass of individuals composing the society; and against that there can be no effectual resistance, because it is sustained by physical force. There is, nevertheless, an intermediate power between that of an individual, or a few individuals, on the one side, and the whole society on the other, from which danger to individual right may be apprehended. It is that power which resides in the person, or the body of persons, on whom is conferred the authority to act in the name and with the sanction of the supposed will of the whole community; which may be observed and used contrary to the will of the community for the purposes of private wrong. The body possessing that power we designate as the government of a country, whether it consists of one or more persons. The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less personal liberty of the citizen, and the greater or less security of private right against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things, or, at their pleasure, abolish them altogether. But when the community allows the right, and declares it to exist, that constitution is the freest and best which forbids the government to abolish the right, or which restrains the government from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected, even from the government itself.

The people of all countries, who have enjoyed the semblance of freedom, have regarded this, and insisted on it, as a fundamental principle. Long before the formation of our present constitution, it was asserted by our ancestors, on various occasions; and, in one sense of it, its vindication produced the revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and of right was ardent, and the weakness of the individual citizen

against the claims of unrestricted power in the government was consciously felt, the people formed the constitution of this state; and therein declared "that no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land:" Bill of Rights, sec. 10. By the fourth section, it is declared, "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other."

In absolute governments, whether hereditary or representative, the division of the powers of government is unimportant, because that body in which resides the superior authority can, at will, make it supreme, and absorb all the other departments. It does not follow, therefore, that because the British parliament, whose supremacy is acknowledged, decides questions of private right, and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate, and often does substantially adjudicate, when it professes to enact new laws. That faculty is expressly denied to our legislature as much as legislation is denied to our judiciary. Whenever an act of the assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right, which is not a legislative but a judicial function. It may not be easy to distinguish those powers, and to define each so that an act shall be seen at once to be referable to the one or the other. But I think that where a right of property is acknowledged to have been in one person at one time, and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is by sentence. If the act of 1832 had been confined in its terms to the clerkship of Lincoln, its judicial character would be obvious. If it had said that Mr. Henderson had forfeited his office, or had conveyed it to Mr. Hoke, or that after forfeiture Mr. Hoke had been duly appointed, or was by that act appointed, or had been elected by the citizens, and was approved by the legislature, and therefore the one should go out and the other go in, it would be plainly, as respects Mr. Henderson's title, an adjudication against it, although the subsequent investment of the title in Mr. Hoke would be legislative. Is the act the less of the former char-

acter because it does not recite an abuse by [H] or other cause of forfeiture? Is not such forfeiture [H] it? For it is impossible, in the nature of things, [H] can be rightfully put in, unless the other be right [H] and Mr. Henderson can not rightfully be deprived [H] thing he claims was never property, or has ceased [H] unless he has parted from the property he had in [H] or otherwise.

This act, however, is not restricted to one c [H] plies generally to all the clerks in every county [H] that for that reason it can not be a judicial act [H] in that light, is wanting in the precision and d [H] usually belonging to, and distinguishing judicia [H] But nevertheless it partakes of that character in [H] on the former officers. If valid, it compels the [H] prive the officers without further inquiry before [H] fact or legal sufficiency of any cause of forfeitu [H] If the legislature can not itself adjudge a forfe [H] still less, it would seem, ought they to command [H] remove without any cause whatever. Nor does [H] of the sentence of expulsion to all the clerks in [H] its character in this respect. The provision is [H] law prescribing a rule of property, or modifyin [H] interest, or the tenure prospectively of which th [H] be susceptible, or declaring that all property [H] cease by the abolition of the offices themselves; b [H] ion, by which the office, preserved in the law an [H] as the subject of property, is taken, and mer [H] one man, and given to another. The only sens [H] transaction can not be called judicial, is that no [H] could have pronounced the judgment under th [H] upon the state of facts in this case. To have [H] a sentence by a court, further legislation wo [H] necessary. It is true, then, that the act is not [H] But this is all that can be said in support of it. [H] true that it is not purely legislative; for it leave [H] the office as it was, in duties, powers, privileg [H] ments, and confers it on one person as a lucra [H] taking it from the former possessor who was [H] knowledged owner. As far as the act is legisla [H] the legitimate powers of the general assembly; [H] admitted that the elections allowed or comm [H] constitutional and valid, and confer a good ti [H]

sons elected where a vacancy existed, and it may perhaps be admitted that they are also valid, and confer a title whenever the pre-existing rights of the incumbents shall expire by lapse of time, or cease by surrender, or by forfeiture, for any cause, declared by law.

The question is not now upon the validity of the title under the new elections to the office, if vacant, or when it shall in future become so, but upon the right claimed under it to immediate induction, notwithstanding the office is already full by a previous legal appointment of another person. To sustain this claim, the previous appointment must be vacated or the officer adjudged out. When the act proceeds to do this, it becomes in that respect an adjudication. Although it is not purely so in all its provisions, and may not in any be conclusively and definitely so, because it does not decide *inter partes* by name, yet it partakes of that nature for the reasons already stated, and the prohibition of the constitution is as imperative against the assumption of the judicial power by the legislature, in combination with their legislative authority, as if the act were a single and simple one of direct adjudication. Creating a right, or conferring it on one when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers, and the consequences of a breach of duty, including punishment and removal, are all political regulations, and fall within the legislative province. But to inflict those punishments, after finding the default, is to adjudge; and to do it without default is equally so, and still more, indefensible. The legislature can not act in that character, and therefore, although their act has the forms of law, it is not one of those laws of the land by which alone a freeman can be deprived of his property.

Those terms "law of the land" do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be "taken, imprisoned, dis-seised of his freehold, liberties, and privileges, be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life," without crime? Yet all this he may suffer if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons, be in itself a law of the land within the sense of the constitution; for what is, in that sense, the law of the land, must be duly observed by all, and upheld and enforced by the courts.

the rights of property, it has been repeatedly held in this state, and it is believed in every other of the union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectually "laws of the land," for those purposes. Although in some instances the principle may have been misapplied, yet it seems in every case in which it hath come into discussion, to be admitted to be a sound one, and the true import of the constitution. It was early asserted in an anonymous case in 1 Hayw. 29. It was acted on again in *Den on dem. Bayard v. Singleton* (Martin's cases, 48), in 1787, in which it was held that the act for conferring titles derived by purchase from the commissioners of confiscated property, which directed that suits brought by claimants of such property should be dismissed by the court on affidavit of the defendant that he was a purchaser from the commissioner, was void. It was elaborately considered in the case of the *University v. Foy*, 1 Murph. 58, 2 Hayw. 310; and declared again in *Den on dem. of Hamilton v. Adams*, 2 Murph. 161. In *Allen v. Peden*, 2 Car. Law, 638, it was distinctly decided that an act of the legislature emancipating a slave against the will of his owner was plainly in violation of the fundamental law of the land, and so void. And in *Doe on dem. of Robinson v. Barfield*, 2 Murph. 391, that a deed of a married woman, not executed according to the existing law, did not pass the title to lands, notwithstanding an act of the legislature passed after her death, enacted that it should be good and effectual for that purpose.

It thus appears, that in respect to every species of corporeal property, real and personal, the principle has been asserted and applied. It has been adjudged, that the legislature can not seize the land or slaves of the citizen from him, and confer them on another; and in the case of *Allen v. Peden*, it was applied in a remarkable manner, and to the extent that the legislature could not enact that the property in a slave should cease and exist in no person, upon the ground, I presume, that it was not a general provision for the extinction of slavery, but the de-

priving of a single citizen of his property, without any motive of public utility, or view to general expediency.

The sole inquiry that remains is, whether the office of which the act deprives Mr. Henderson is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities, than by barely stating it. For what is property; that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others, is said to have the property. That an office is the subject of property thus explained, is well understood by every one, as well as distinctly stated in the law books from the earliest times. An office is enumerated by commentators on the law among incorporeal hereditaments; and is defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging: 2 Bl. Com. 36. A public office has been well described to be this: When one man is specially set by law, and is compellable to do another's business against his will and without his leave, and can demand therefor such compensation, by way of salary or fees, as by law is assigned; to the doing of which business no other person but the officer, or one deputed by him, is legally competent: Carth. 478; *Leigh's case*, 1 Munf. 475. That the purpose of creating public offices is the common good, is not doubted. Hence, most of the rules regulating them have a reference to the discharge of the duties, and the promotion of the public convenience; they are *pro commodo populi*. Hence they are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property as far as they can be so in safety to the general interest involved in the discharge of their duties. This principle demands that different rights of property should be recognized in different offices. It is one of the ordinary rights of property to alien and dispose of it at pleasure; but that is inadmissible in public offices, because the public require a responsible person to answer for defaults. Besides, the power of alienation is not the test of property; for doubtless it is within the scope of legislative authority to restrict it or to deny it, as in the laws which prescribe the ceremonies necessary to the validity of wills, or conveyances of infants and married women, and which deny altogether the power of conveying, and which interdict all conveyances made in mortmain.

It is another ordinary right of property to have the power of substituting another person to manage it, or to let it lie idle and unmanaged. But the former is not allowable in some offices, and the latter in none. The chief executive office and judicial offices can not be delegated, while subordinate ministerial ones may; for there would be no security that, in the former cases, the delegate would be competent, and no responsibility of the superior would be adequate to answer the consequences; though in the latter it is otherwise. But non-user is punishable in all public officers, and, at the election of the public, is a forfeiture. So a misdemeanor or corruption in office may be punished by judicial sentence in any manner prescribed by law, including a motion as for a forfeiture. These are all restrictions and penalties to secure the public service, which is the object in creating the office. But with these limitations, and the like, a public office is the subject of property, as every other thing corporeal or incorporeal, from which men can earn a livelihood and make gain. The office is created for public purposes, but it is conferred on a particular man, and accepted by him as a source of individual emolument. To the extent of that emolument it is private property, as much as the land which he tills, or the horse he rides, or the debt which is owing to him. Between him and another man, none will deny the right of property. For if one usurp an office which belongs to another, the owner may have an action for damages for the expulsion, for the fees of office received, and a remedy by *quo warranto*, to inquire into the right of the usurper, and by *mandamus*, to be himself restored. When we find these remedies established to enforce the right of admission into office, to secure the possession of it and its emoluments, we can no longer doubt that, in law, an office is deemed the subject of property, and valuable property, to the officer, as well as an institution for the convenience of the people. If it be so, it falls within those provisions of the constitution which secure private interests; and can not be divested without some default of the officer, or the *cesser* of the office itself.

These are the general principles that lead the court to the conclusion that the act of assembly is invalid.

In opposition to them, several arguments have been urged, which the court has anxiously considered, but without a change of opinion.

It was principally urged that, whatever may be the rule of the common law, yet in this country, and under our republican in-

stitutions, public offices can not be admitted to be private property; but the offices must be regarded as created solely for the public use, and therefore as subject to abolition when required by the general interest, of which the legislature is exclusively to judge. This argument was illustrated by the additional observation, that by the contrary doctrine, a system requiring officers for its execution once fixed, would be unchangeably permanent, the absurdity of which was strongly insisted on and proved by the various changes in our judiciary system, which have all been acquiesced in without a scruple of their constitutionality.

The court does not perceive the least reason to doubt the validity of any one of those laws, nor to question any part of the propositions stated by the counsel, except that offices can not be the subjects of private property. Undoubtedly, the creation of an office is a question of political expediency; so is the qualification of the officer, and so are his duties, perquisites, punishment, and the tenure by which he holds his office. By consequence, they are the subject of legislative regulation. And as the creation, so is the continuance of the office, a question of sound discretion in the legislature, of which a court can not question the exercise. If the legislature increase his duties and responsibilities, or diminish his emoluments, he must submit, except in those cases in which the constitution itself has declared the duty and fixed the compensation; because in the nature of things, those are the subjects of such regulations as the general welfare may, from time to time, dictate, and the office must therefore have been conferred and accepted subject to such regulation.

The legislature is charged with the duty of securing the rights of suitors, and of all persons who have their business done only by the clerks, against loss through the person thus appointed by the law, as well as with the duty of securing a reasonable compensation to the officer for his time and labor. It is competent, therefore, to call for large official bonds, and to increase or diminish the fees; for all that concerns the interest of the community at large. So also it is yielded, for the like reasons, that the office itself, when it ceases to be required for the benefit of the people, may be abolished. There is no obligation on the legislature or the people to keep up an useless office, or pay an officer who is not needed. He takes the office with the tacit understanding, that the existence of the office depends on the

public necessity for it; and that the legislature is to judge of that.

But while these postulates are conceded, the conclusions drawn from them can not be admitted. They are, that there can not be private property in public offices; and if there be, that the officer may be discharged at the discretion of the legislature. Neither of these propositions is believed to be correct. The former has been already considered at large; and to what has been said may be added the provisions in our own constitution, guaranteeing adequate salaries to certain officers, and declaring that no person shall hold more than one lucrative office at one time. The latter by no means follows from the premises. It may be quite competent to abolish an office; and true, that the property of an officer is thereby, of necessity, lost. Yet, it is quite a different proposition, that, although the office be continued, the officer may be discharged at pleasure, and his office given to another. The office may be abolished, because the legislature esteem it unnecessary. The common weal is promoted by that law; at least, it is the apparent object, and must be deemed to be the real one. But while the office remains, it is not possible that the public interest can be concerned in the question, who performs the services incident to it. The sole concern of the community is, that they should be performed, and well performed, by somebody. That they should be done by one particular person more than by another, is not therefore a matter of expediency in any sense; and hence it can not be the subject of legislation, that one man, who has the faith of the public pledged to him, that he should have the employment for a certain term, and who has, upon that faith, entered upon the employment, and faithfully executed it, should be deprived of it and supplanted by another man, who is to do, and can do the community no other services than those already in a course of performance by the former.

It is true that a clerk, like all other officers, is a public servant; but he has also a private interest. He is not merely a public servant and political agent. If he were, and had no interest of his own, he might be discharged at pleasure. The distinction in principle between agencies of the two kinds is obvious. The one is for the public use exclusively, and is often neither lucrative nor honorary, but is onerous. To be deprived of such an office is often a relief, and never can be an injury. The other is for the public service, conjointly with a benefit to the officer. To be deprived in this last case is a loss to the officer.

If it arise by the destruction of the office, it is a loss without an injury; because the right of the officer is necessarily dependent upon the existence of the office, as an establishment in the political economy of the country. But if it arises from the transfer of the emoluments, the loss then becomes an injury; because that which belongs to one man, as a thing not simply of ideal but of real value, is taken from him and given to another. The distinction which I am endeavoring to express and explain, may be fully exemplified by the difference between the public agency exercised in appointing a clerk, and that exercised in discharging the duties of a clerk. By the law, the judges of the superior courts and the justices of the county courts were authorized to appoint the clerks of their respective courts. That power is an office in the extended sense of that word, which originally signifies duty, generally; but it is not a lucrative or a valuable office. It was a duty to be performed exclusively for the public convenience, and with reference to it alone, without any benefit, immediate or remote, to the judges and justices as individuals, who were required, by oath, not to make any private advantage from it, but to give their voice for the appointment of only such persons as appeared to them to be sufficiently qualified, and to do that without reward or the hope of it, or any private motive whatsoever. The courts were in this respect not exercising a judicial function, nor serving for emolument, but were the mere ministers of the law, and naked agents of the body politic to effect an end purely public. Such political agents the legislature can discharge whenever it shall appear to them that the end can be better effected through other agents.

But when the country has through those agents appointed a person to the office of clerk, though he also is a servant of the public, yet he is something more than a naked, uninterested, political instrument. For the term for which the law assures the office to him, he claims, and can claim, to continue to be the agent of the public to discharge the duties of that place, while there are duties remaining to be discharged, and he is ready and willing to perform them. Nor is there anything in our constitution, the form or nature of our government, to change the character of this right. There is no reason why a public office should not be given during good behavior. The services are what concern the country; and they may be expected to be best done by those whose knowledge of them, from time and experience, is most extensive and exact. Some offices can,

under the constitution, be granted or conferred for no other term but that of good behavior. Such is the provision respecting the office of a judge and justice of the peace. Certainly that is not introduced solely for the benefit of the persons holding those offices, but upon the great public consideration, that he who is to decide controversies between the powerful and the poor, and especially between the government and an individual, should be independent, in the tenure of his office, of all control and influence which might impair his impartiality—whether such control be essayed through the frowns of a bad man, or through the adulation of an artful one, or such influence be produced by the threats of the government to visit non-conformity to their will by depriving him of office, or rendering it no longer a means of livelihood. For these reasons, the constitution has fixed the tenure of the judicial office to be during good behavior. The people have said that the liberty and safety of the citizen required that it should not be held upon any other tenure. It is clear, therefore, that our ancestors did not entertain the notion that such a tenure was not consistent with our institutions generally.

It is true, that it does not put clerks upon the same basis. There was not the same reason for it. The public interest did not require that any law should be laid down to the legislature as to the tenure of those offices; but it was left to their discretion, as expediency might from time to time require it to be altered. It was, therefore, in the power of the legislature to confer such offices for life, or during good behavior, or during pleasure, or for any term of years, determinable with life at an earlier day. For an absolute term of years it could not be granted; as upon the death of the officer, it would in that case go to his executor, which would be inadmissible, since the office concerns the administration of justice, and an incompetent person might be introduced into it. It, however, pleased the legislature to make the tenure during good behavior. When they did so, it was quite within their competency to alter it subsequently. But such alterations must operate prospectively, and as regulations for future appointments and future enjoyment. As to those to whom the grant was made for life, an estate, a property vested; which can not be divested without default or crime.

This course of reasoning in some degree anticipates some other arguments urged for the plaintiff; which, however, it may

be more becoming to state distinctly, and consider more particularly.

It was said, that as the tenure was necessarily at the will of the legislature, he who took the office received it subject to such alteration of tenure, as well as of duties and emoluments, as the legislature might prescribe. And the distinction between the tenure of the judicial office as being constitutional and unalterable, and that of a clerk as being statutory, and therefore alterable, was strongly urged.

The distinction is admitted, but not the argument derived from it. The constitution restrains the legislature from appointing a judge or justice of the peace, except during good behavior. It does not restrain them in respect to a clerk, but allows that office to be given for a longer or a shorter term, as may be most expedient. The question is, what is the effect of a grant for a particular period? Can the duration be afterwards lessened to the prejudice of a grantee? We think not; because he acquires a property. That it may be lessened in reference to new appointments, can not be contested; but that it can, in respect to existing ones, involves the propositions already discussed, that an office is not the subject of private property, and that private property may be seized without judicial sentence, and even without compensation. This property does not differ from that in other subjects, as far as it is allowed at all. In lands there may be estates in fee, for life or for years. The legislature may grant the public domain in any of those estates; but if it please them once to grant it, the grant is irrevocable, and the estate can not be resumed. It becomes the land of a citizen, and can not be taken from him by a law, without the action of his peers, as a jury, to pass on the facts, and of a court to determine the title. It is further said that the distinction between these offices, as derived from the constitution and a statute, is exhibited in the power to alter the compensation. That the clerk must be considered as holding office at the will of the legislature, while the fees depend entirely on their pleasure; whereas, a judge, who holds his office independent of that will, is necessarily entitled to his salary as stipulated to be paid to him. Upon this latter proposition, a person in my situation can not be expected to express, and can not properly express, an opinion. But taking it to be true, it does not establish the point to which it is adduced. If it be true, it arises as an incident to the independent tenure of the judicial office fixed by the constitution.

No such object was in view, in respect of a clerical office. All that is intended is, that the legislature shall allow such fees as are adequate to the livelihood of the clerk, and as a compensation for his labor. It is supposed that a sense of justice will ever influence the legislature to do this, and, if not, that the public interest will. For this argument assumes that the office is still necessary to the public convenience, and continues, by law, to exist. Without a competent officer, with a competent livelihood, the office must be unfilled, except by compulsion, and if occupied, the duties will be unperformed. No danger therefore could have been apprehended, that the legislation on this subject would be unjust to the officer, who, in the line of his official duty, can never be called to do an act which will render him obnoxious to the government or the men of power of his day. Nor was the danger more to be expected, that the public interest would suffer by the legislature not providing proper and sufficient offices, in which the business of the citizens might be transacted; and if such inconvenience should at any time arise, it could be only temporary, and would be redressed upon another election of representatives. The analogy between those offices, in this respect, does not therefore exist as supposed; and it may well be that the legislature can regulate the emoluments and prescribe the duties and punishments of the clerk, without possessing the power of depriving him of office, merely for the sake of benefiting another person.

Nor do those powers, nor that of abolishing the office altogether, which are readily conceded to the legislature, involve the further one of depriving the officer of his office, while it continues.

It has been urged that it is vain and futile for the court to refuse to execute this law, and to uphold Mr. Henderson's title, because if the legislature be determined in their purpose, they can be still more unjust by destroying the office itself, or taking away the fees.

There are several answers to that argument. The abolition of the office depends upon the necessity for it in the opinion of the legislature and of the people; if useful, doubtless it will be preserved; and if it be not, private interest must yield to general convenience. But admitting it to be necessary, and that Mr. Henderson is constitutionally entitled to it during his good behavior, it is not to be expected, nor apprehended; it can not be imputed to the legislature that it will, for the indirect purpose of expelling by starvation, render the office more onerous,

without adequate compensation, or take away the compensation altogether, while the duties remain as they are. If such a law were to pass, it would itself be unconstitutional—that being the object. If the purpose were declared in the law in such terms, that the court could say that the act was passed upon no other, the same duty would then be imposed on the court which we are now discharging. But if the law be couched in general terms, so that the court, which can not inquire into motives not avowed, could not see that the act had its origin in any other consideration but public expediency, and therefore would be obliged to execute it as a law; still it would not, in reality, be the less unconstitutional, although the court could not pronounce it so. It would be law, not because it was constitutional, but because the court could not see its real character, and therefore could not see that it was unconstitutional. It would not be constitutional as a provision which deprives a citizen of his property; but it would be held so, because we should be obliged to regard it as not having such a provision. The argument is therefore unsound in this: That it supposes (what can not be admitted as a supposition) the legislature will designedly and willfully violate the constitution, in utter disregard of their oaths and duty. To do, indirectly, in the abused exercise of an acknowledged power, not given for, but perverted to that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the constitution; and the more so, because the means resorted to, deprive the injured person, and are designed to deprive him, of all redress, by preventing the question becoming the subject of judicial cognizance.

But that is not the only test of the constitutionality of an act of the legislature. There are many laws, palpably unconstitutional, which never can be the subjects of legal controversies. Not to allude to the causes which have been recently the themes of the bitterest political controversies, several instances of much simplicity may be adduced from our state government. The constitution of this state provides, that the governor, judges, attorney-general, treasurer, and other officers shall be elected by the general assembly by ballot, and that certain of them shall have adequate salaries during their continuance in office. Suppose the legislature to refuse to elect those officers; or to give them salaries; or, after assigning them salaries in a statute, to refuse to lay taxes, or to collect a revenue to pay them. All these would be plain breaches of con-

stitutional duty; and yet a court could give no remedy, but it must be left to the action of the citizens at large to change unfaithful for more faithful representatives. Yet no one will say that the legislature can, by law, remove the governor or a judge, or any other head of a department, because they can unconstitutionally refuse to provide salaries for them, and the courts can not compel the raising of such salaries. Nor can it be said, because there can not be such compulsion, that therefore the law is constitutional. All that can be said is, that such is the imperfection of all human institutions, that it is not possible to anticipate and provide against all vices of the heart, more than all errors of the head; and that, after every precaution, much reliance must be placed in the integrity of our fellow-men, and that such confidence is liable to be abused. But I think it may safely be assumed, as is done in the constitution, with all the responsibilities of the legislative representatives to their constituents under frequent elections, with all the clear declarations of the rights of the citizen in that instrument, with the division of the powers of government made in it, whence arise the powers and the duty of the judiciary to ascertain the conformity of a statute with the constitution; that with all these guards against abuse, the danger of a willful and designed violation is never to be apprehended. No arguments, therefore, in favor of the necessity of executing a particular act, apparently inconsistent with the constitution, can be drawn from any supposed ability of the legislature to effect the same end by indirect means, which are beyond the cognizance and control of the judiciary. When such an abuse shall occur, it will devolve on the people themselves to correct it, and not on us as a portion of their subordinate agents.

I have omitted to consider in its proper place, another objection made by the counsel for the defendant, and must therefore now take notice of it. It has been said, that the obligation to
7 continue in office ought to be mutual, to be complete, and that such is not the case, because the officer may, at his pleasure, resign. The argument on behalf of the power to discharge an officer, assumes the right of the officer to discharge himself; and in that point differs entirely from the law as it stands in the conception of the court. An officer may certainly resign; but without acceptance, his resignation is nothing and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter

of course, with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are on our statute book several acts to compel men to serve in offices; as the act of 1741, which inflicts a penalty on one appointed a constable, and neglecting or refusing to qualify; the act of 1777, which compels a sheriff to serve at least one year; the various acts directing the appointment and services of overseers of the road; and the recent statutes restraining certain militia officers from resigning under five years, and the like. Every man is obliged, upon a general principle, after entering upon office, to discharge the duties of it while he continues in office, and he can not lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged. The obligation is, therefore, strictly mutual, and neither party can forcibly violate it. If, indeed, the public change the emoluments of office, it is another question, whether that be not an implied permission for the officer to retire at his election, unless the contrary be provided in the law. For I can not doubt, that the legislature has the perfect power, if it choose arbitrarily to exercise it, of compelling, not indeed a particular man designated in a statute by name, but any citizen elected or appointed, as by law prescribed, to serve in office even against his will. I have mentioned some instances in which it is done; and there is no reason why, making due compensation, it may not be done as to all offices.

It is true that non-user of an office is a forfeiture of it; and that is spoken of as a penalty and punishment in itself. But it is not the only punishment, and is a punishment only when the office is itself valuable. Such a forfeiture does not discharge the officer, but at the election of the sovereign; for that would be to say that an onerous office could not be conferred. The officer may be punished by removal for non-user as a forfeiture, or he may be kept in office, and punished personally for non-user as a crime.

It is lastly said, that it can be no injury to remove an officer, because the salary is taken to be but a just compensation for his time and labor, and when the public do not take the latter, the officer can have no demand for them. This position is rather an artful than a solid or fair argument. It is true that to the officer is left the command of his own time, and the

application of his own labor, and the fruits true that he does not suffer by being deprived? Of an employment, the immediate, the preparation for which has been the may be, of his life, to which he has served ship, and to which he has devoted himself lines of life, or other roads to fortune which his free choice. True he is free to work at but he is fit for none; he knows but this. tion of one bred to the agriculture of our legislature should say: "Till the ground n silk, or weave muslin." His labor is not scription, but he hangs a burden on himself employment to which he is competent is de is therefore undeniable. The only question such an one as the legislature can rightfully as already stated, that they may, if it be n consequence of a general law really passed abolishing useless offices, as a species of g tion. But that they can not, if the offices officer is deprived of his property therein, without trial, for the single and sole purpose another.

It became the court to consider this subject all its bearings. We have done so without either side from the direct line of the law but with the utmost respect for the opinion those from whom we differ. But having re above stated, upon which no member of are obliged to pronounce it as a duty not being a known duty, we do so without r of the right of the citizen, and of the inviolable mental law of the land.

The judgment of the superior court must

By Court. Judgment affirmed.

OFFICES—HOW FAR SUBJECT TO LEGISLATIVE claimed on the part of the officer that he was in consequence, his salary, tenure, etc., were without The claim in such an unrestricted form has been in all of the states, except North Carolina, and it has been denied *in toto*.

In *Conner v. New York*, 2 Sandf. 355, the plaintiff county of New York, brought an action to recover under protest. The case was, that at the time of

tion consisted in fees, and that by a subsequent act, his compensation was directed to be by salary, and he was required to pay over to the city the fees by him collected. The fees being of much greater amount than the salary allowed him, the action was brought. Among the numerous grounds urged by him in favor of his recovery, was that his right to his original compensation arose under contract, and was in consequence beyond the control of the legislature.

But the court, denying this view, said: "We think it must be assumed that there is no contract, express or implied, between a public officer and the government whose agent he is. The latter enters into no agreement that he shall receive any particular compensation for the time he shall hold office; nor, in the case of a statutory office, that the office itself shall continue any definite period. Where the constitution limits the compensation, it is beyond legislative control; but that makes no contract. The people have the control in their sovereign capacity, as the legislature has in statutory offices. * * * On the part of the officer, there is still less in the nature of a contract. Whether he holds under a constitution or a statute, he is under no obligation to discharge his duties a single day. He may resign at any time, and no power of the government can prevent him: *United States v. Edwards*, 4 McLean, 467. The legislature may attach penalties to a refusal to serve in a public station, but that does not affect the question." The court therefore held that the officer had, as against the state, no vested right or proprietary interest in his office, and that he should not be heard to complain of a reduction made in his salary by the legislature, at a time subsequent to his election. A different doctrine, says the court, is unsupported by other authority than that of *Hoke v. Henderson*.

The decision was affirmed in the court of appeals, 1 Seld. 285. There Ruggles, C. J., says, speaking of the nature of offices, and why they should be under legislative control: "Public offices in this state are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken, and may at any time be resigned. They are created for the benefit of the public, and not granted for the benefit of the incumbent. Their terms are fixed with a view to public utility and convenience, and not for granting the emoluments during that period to the officeholder." In *Commonwealth v. Bacon*, 6 Serg. & R. 622, the salary of an officer had been reduced, and for identical reasons the court refused to grant him his demanded redress. They said that it was not obligatory upon the officer to serve out his term, that his service was not in the nature of a hiring for any definite period, and they dwell much upon the inconvenience which would result if an officer were entirely beyond the control of the legislature, once elected, because of its being holden that he was in under contract. Indeed, the *argumento ab inconvenienti* is one much relied on in this class of cases.

But as, if the officer held under contract, he was protected by the constitution of the United States, the final adjudication of the subject belonged to the national tribunals.

The question was brought before them in *Butler v. Pennsylvania*, 10 How. U. S. 402. In 1836, the state of Pennsylvania passed a law directing canal commissioners to be appointed annually by the governor, and that their term of office should begin on the first of February of each year. The pay was four dollars per diem. In April, 1843, certain persons being then in office as commissioners, the legislature passed another law, providing amongst other things, that the per diem should be only three dollars, the reduction to take effect upon the passage of the law; and that in the following October commissioners

should be elected by the people. The commissioners claimed the full allowance during their entire year, upon the ground that the state had no right to pass a law impairing the obligation of contracts. The supreme court held that claim not valid, and that the state law was constitutional, re-asserting the doctrine laid down in the state courts, that officers were only agents appointed for the benefit of the people, who could vary the agency in the manner that best pleased them. The court point out how awkward and inconvenient would be the consequences that would unavoidably flow from the other construction. There are many other cases of like import, but as, though differing in language, they are repetitions as to the reasoning, it is useless to do more than allude to them with reference to the points decided.

Then, as deciding that an office may be abolished during the term for which the incumbent was elected, reference may be made to *Wilcox v. Rodman*, 46 Mo. 323; *Perkins v. Corbin*, 45 Ala. 103; *State et al. v. Douglas*, 26 Wis. 428; *Whittington v. Polk*, 1 Har. & J. 236; *Knoup v. Piqua Bank*, 1 Ohio St. 616; *Walker v. Peelle*, 18 Ind. 264. As deciding that during the time for which the incumbent was elected, the salary or the emoluments of his office may be decreased: *Alexander v. McKenzie*, 2 S. C. (N. S.) 81; *State v. Davis*, 44 Mo. 129; *The State v. Dens*, R. M. Charl. 397; *Barker v. Pittsburgh*, 4 Barr, 51; *People v. Bull*, 46 N. Y. 57; S. C., 7 Am. Rep. 302. That without abolishing the office, the legislature may, before the expiration of the term of the incumbent, legislate him out and another into the office: *Bryan v. Cattell*, 15 Ia. 538; *Taft v. Adams*, 3 Gray, 126; *State et al. v. Douglas*, 26 Wis. 428; *Alexander v. McKenzie*, 2 S. C. (N. S.) 81; *State v. Davis*, 44 Mo. 129; *People v. Haskell*, 5 Cal. 357; *Attorney-general v. Squires*, 14 Id. 12; *People v. Banvard*, 27 Ia. 470; *Standiford v. Wingate*, 2 Duv. 440; *Evans v. Populus*, 22 La. An. 121. But in North Carolina, the doctrine held is somewhat different. In the principal case, the official is declared to have a vested right in his office. And that though it is within the power of the legislature absolutely to abolish the office, yet it is without their power, during the incumbent's term of office, to legislate him from office, while yet leaving the office in existence. For if this were allowed, then, as there is a vested right in the incumbent to his office, it would follow that by such legislative enactment he was deprived of his property, without having had a hearing before the judicial tribunals of the country.

But if the incumbent has a vested interest in his office, it must necessarily be because of contract existing between himself and the state, and it is upon that ground that the protection accorded the officer is placed in the subsequent case of *King v. Hunter*, 65 N. C. 603, the court saying: "Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the state that he will discharge the duties of his office, and he is pledged by his bond and oath; and that he shall have the emoluments; and the state is pledged by its honor. When the contract is struck, it is as complete and binding as a contract between individuals; and it can not be abrogated or impaired, except by the consent of both parties. We do not wish to be understood as holding that there is any iron rule of construction of the details of the contract; on the contrary, there must be some flexibility to suit the convenience of the public and the convenience of the officer, such as would be implied from the nature of the contract, and such as circumstances make necessary, *ex gratia*, that if it happened that the emoluments are so inadequate that for them the officer can not afford to serve the public, they may be increased, or if they be so extravagant as to be burdensome to the public, they may be diminished. But this must be done in good faith and

in fair dealing, and with no view to evade, or directly or indirectly to impair the substance of the contract." See, too, *Cotten v. Ellis*, 7 Jones, 545; *Brown v. Turner*, 70 N. C. 93; *Vann v. Pipkin*, 77 Id. 408. How far the flexible rules entering into the composition of the contract would permit the legislative interference to go, the court does not say, but it would seem, from the language above quoted, that it might possibly be held that it would be without the power of the legislature to unreasonably reduce the salary of an officer. Such a doctrine would certainly receive countenance nowhere else.

It may be proper to observe that the principal case has been, in terms, denied in *Conner v. New York*, 2 Sandf. 355; *Alexander v. McKenzie*, 2 S. C. (N. S.) 81; *Standiford v. Wingate*, 2 Dav. 440.

With all deference to the North Carolina courts, the conclusion may yet be drawn, with Mr. Pomeroy, that: "It may, therefore, be considered as a settled point of constitutional law, settled both by the national and state courts, that a public office bears no resemblance to a contract; and that legislatures have full power over the public offices of a commonwealth, except so far as they may be restrained by the local constitutions. The clause of the United States constitution which prohibits state laws impairing the obligation of contracts, has no application whatever to this subject:" Pomeroy on Const. Law, sec. 553.

But although offices are employments in behalf of the public, it does not follow that all employments in such behalf are offices; such employment may well constitute a contract, and if such be the case, then that employment is without the power of the state. The late case of *Hall v. Wisconsin*, decided by the supreme court of the United States November 15, 1880, exemplifies this. There Hall and others had been appointed by an act of the legislature commissioners to make a survey of the state. The governor was, by the same act, directed to enter into a contract with each commissioner for the performance of his allotted work, etc. Such contract was entered into accordingly. Subsequently the act above mentioned was repealed, and it was held that the employment of plaintiff was not an office which the legislature had a right to abolish at pleasure, but a contract, the obligation of which could not be impaired by a state legislature. See, also, *United States v. Hartwell*, 6 Wall. 393, where the following distinction is taken between government offices and government contracts: An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. * * * A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration, and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other. But where an office is provided for by the state constitution, in all respects in which it is so protected it is beyond the legislative control. A familiar instance is the ordinary provision protecting judges in tenure and salary. It is held that by this the judges are not only removed from direct legislative interference, but it is also held that it is without the power of the legislature to indirectly abolish the office by adding the circuit of the incumbent to another then existing, and this even if it be within the power of the legislature to create new or alter old circuits, for that power must be so exercised as to leave the incumbent his office: *People v. Dubois*, 23 Ill. 547; *State v. Messmore*, 14 Wis. 163; *Commonwealth v. Gamble*, 62 Pa. St. 343; S. C., 1 Am. Rep. 422.

It has also been held in respect to this class of officers, that a provision

enacting that the judges should receive an adequate compensation, "to be fixed by law, and not to be diminished during their continuance in office," protected these officers not only in the amount of salary fixed by law at the time they were appointed, but also gave them an indefeasible right to any increase made in their salary during their term: *Commonwealth v. Mann*, 5 Watts & S. 403. "But the decision of the court has been questioned on the ground that the increased salary was subject to legislative control, under the restriction, however, that the allowance was not to be lessened in respect to the judges, or any of them, below the point at which it stood when they respectively came into office:" 1 Kent Com. 295.

If provision be made for an office, but none for the incumbent, then, though this latter may be within legislative control, the office will be beyond that power; *e. g.*, if the office of sheriff be provided for in the constitution, but nothing is there said as to the salary or tenure of the incumbent, then the salary or tenure may be altered at the legislative pleasure; but there can not be any transfer of the duties incumbent upon the sheriff to another officer, such, for instance, as the tax collector or the clerk of court; for, if that were allowed, it would be to that extent a destruction of the office of sheriff: *Warner v. People*, 2 Denio, 272; *State v. Brunst*, 26 Wis. 413; *King v. Hunter*, 63 N. C. 603. Where the constitution of the state directs that certain officers shall be elected by the people, and authorizes the legislature to fix the term of office, and the time and manner of election; after the length of term has been prescribed by legislative enactment and the office filled, an act extending the term of the incumbent is unconstitutional, for it would be, in so far as the extension was concerned, a filling by legislative appointment of an office declared by the constitution to be elective: *People v. Bull*, 37 N. Y. 57; *People v. McKinney*, 52 Id. 374; *Howard v. State*, 10 Ind. 99; but this has been held otherwise in California: *Commissioners v. Christy*, 39 Cal. 3.

The principal case is cited on the point, that an act of the legislature will never be declared unconstitutional unless the unconstitutionality is apparent beyond doubt, in *State v. Moss*, 2 Jones, 66; *Galloway v. Chat. R. R. Co.*, 63 N. C. 147. That the legislature may enact what laws to them may seem meet, except wherein restrained by the constitution, in *Thompson v. Floyd*, 2 Jones, 313; *Lyon v. Aikin*, 78 N. C. 258. That the private property of a citizen can not be taken from him, either with or without a compensation, for other than a public purpose: *State v. Glen*, 7 Jones, 321. That the person holding an office takes it subject to the power of the legislature to increase its duties and responsibilities, or to diminish its emoluments during the term of office: *Bunting v. Gales*, 77 N. C. 283. That an office which is neither of a lucrative nor of an honorary character, may be transferred at the will of the legislature: *Clark v. Stanley*, 66 N. C. 59.

THE JUDICIARY MUST INQUIRE INTO THE CONSTITUTIONALITY of statutes, and pronounce them void if in conflict with the constitution: *Baily v. Gentry*, 13 Am. Dec. 484.

IN CONSTRUING A STATUTE, the intention of the legislature must prevail: *People v. Utica Insurance Co.*, 8 Am. Dec. 243; but where the words of the statute are not doubtful, that intent can not be sought elsewhere: *Salling v. McKinney*, 19 Id. 722.

WHEN STATUTES ARE UNCONSTITUTIONAL AS ASSUMPTIONS of the judicial function, see *Dupuy v. Wickwire*, 6 Am. Dec. 729; *Merrill v. Sherburne*, 8 Id. 52; *Crane v. Meginnis*, 19 Id. 237.

WHAT IS THE "LAW OF THE LAND."—See *Bank v. Cooper*, 24 Id. 517.

AM. DEC. VOL. XXV—45

DOE EX DEM. CARSON v. BAKER.

[4 DEVEREUX LAW, 220.]

A LICENSEE IS NOT ENTITLED TO NOTICE TO QUIT.

EJECTMENT CAN BE MAINTAINED AGAINST A LICENSEE only after demand made upon him for the possession, or after acts done by him of such character as to make him a wrong-doer.

EJECTMENT WILL NOT BE MAINTAINED BY A DEMISE, laid as upon a day, upon which the defendant was in lawful possession of the land.

EJECTMENT. The defendant had gone into possession, with the understanding that he should receive from plaintiff's lessor, at any time that he desired it, a deed of her interest in the premises. In September, 1830, defendant was served with notice to quit on the first day of January next ensuing. On the eighteenth of April, 1831, defendant was served with the declaration, the demise therein being laid as on the first of January, 1831. The court below was of opinion that the notice to quit was not sufficient, and gave judgment of nonsuit. Plaintiff appealed.

Mordecai, for the plaintiff. The defendant was not tenant from year to year, and therefore not entitled to notice to quit: *Jackson v. Deyo*, 3 Johns. 422; *Smith v. Stewart*, 6 Id. 46 [5 Am. Dec. 186]; *Right v. Beard*, 13 East, 210; *Jackson v. Rowan*, 9 Johns. 830.

Devereux, contra.

RUFFIN, C. J. The position seems to be correct, that the defendant was not tenant from year to year, and therefore was not entitled to notice to quit, in the sense of determining thereby his estate. For he did not enter claiming an estate in himself, or legal interest in the land, and was not liable for rent, either in a sum agreed on, or by way of use and occupation. His possession was merely by the license of the owner for an indeterminate period; which seems to be the only remnant of the old strict common law tenancy at will, which now exists.

In such cases the possession is lawful, and may be continued until one party or the other determines the will: the lessor, by demanding the possession, or the occupier by some act wrongful to the owner, which turns him into a trespasser. Before that, ejectment can not be maintained; for that action assumes, that the possession of the defendant at the time of bringing it, and at any time after the demise laid in the declaration, is wrongful. Hence in *Right v. Beard*, 13 East, 210, it was held that after the

defendant had been put into possession under a treaty for a purchase by the lessor of the plaintiff, he could not maintain this action until the defendant was made a wrong-doer, either by a refusal to deliver the possession or some other tort. Hence the notice given in this case was necessary, or some other. The question remains, whether this action is consistent with that notice, so as to be sustainable upon it. The notice is to quit on the first day of January, 1831; and the declaration was served in April, 1831, upon a demise laid on the first of January. It has been in some cases argued, that service of the declaration, of itself determined the will, and that the common rule subsequently entered into, includes an admission of the entry of the lessor to make the demise, which is sufficient. If this be true in any case, it can be only where the demise is laid on the day of the service; for it must go on the idea that the entry to serve the declaration determined the permissive occupation, and that then the demise was made, and the ouster subsequently; which the occupier is not bound to defend, and therefore defends at his peril. But if the demise be laid as of a prior day, then it is before any supposable entry of the lessor, because the defendant's possession on that day was legalized, and as a fiction, a lease, apparently illegal, can not be admitted. Hence it is laid down generally, that in all cases of permissive occupations, the demise must be laid after the determination of the license: *Birch v. Wright*, 1 T. R. 383; *Adams on Eject.* 191. This is not merely technical, because the action supposes the lessor to have the right to make the demise at the time it is laid, and that the defendant had then no right to possess, and hence, it is conclusive of the lessor's title from that day, in the action for mesne profits. In *Dem v. Rawlins*, 10 East, 261, no demand of possession was shown, except the service of the declaration, which, it was insisted, was sufficient. But the contrary was held, upon the ground that the demise was laid on the preceding first of January, and the court asks, from what time before the service of the declaration was the defendant a trespasser?

In the case before us, the question is not upon the effect of another notice to quit before January, if one had been given; nor upon the effect of the declaration, if it had been served on the first of January; but whether, upon the notice given, the lessor of the plaintiff can be supposed to have made the demise on that day. He can not, because it was not against his will that the defendant should possess to the end of that day, and therefore, until its expiration, the lessor can not be presumed to

have entered, as the demise assumes he did. Until the end of the day, the defendant had not refused to deliver the possession as demanded, and consequently was not a trespasser at the time of the demise. Upon this ground, the judgment must be affirmed.

By Court. Judgment affirmed.

Generally, as to when notices to quit are unnecessary before bringing ejectment, see *Bates v. Austin*, 12 Am. Dec. 395; *Jackson v. French*, 20 Id. 699. The principal case is cited upon the point that a party entering into possession under a parol agreement, no rent being reserved, is but a tenant at will, and not entitled to notice to quit, but that before trespass can be brought against him there must be made a demand of possession, in *Love v. Edmonston*, 1 Ired. 152; *Humphries v. Humphries*, 3 Id. 362; *Butner v. Chaffin*, Phil. 497; and upon the point that ejectment will not be maintained where the demise is laid upon a day when the premises were in the rightful possession of defendant, in *Guess v. McCauley*, Phil. 514.

THOMAS v. GARVAN.

[4 DEVEREUX LAW, 223.]

EJECTMENT, NOT PARTITION, IS THE REMEDY OF A TENANT IN COMMON ousted by his co-tenant.

AN OUSTER WILL BE PRESUMED by one co-tenant against the other, from a sole possession held for twenty years or more.

PETITION for partition. The original petition was filed in 1828 by Sarah Mulford, for whom, at her death, in 1829, were substituted the present plaintiffs. The pleas put in denied that plaintiffs and defendant were tenants in common, and asserted an adverse possession by the latter. It appeared from the evidence that in 1802 all the interest of Ephraim Mulford and his wife Sarah was deeded to Richard Garvan; but at the time of the execution of the deed, Sarah Mulford was not privately examined. In 1807 Ephraim Mulford, and in 1827 Richard Garvan died, the latter having remained in sole possession of the lands in controversy from the date of the deed in 1802 to the time of his death. The lands were devised by him to the present defendant. There was a verdict for defendant, and the petition was thereupon dismissed.

Devereux, for the plaintiffs.

Badger, contra, cited *Pierce v. Myrick*, 1 Dev. 345; *Morrissey v. Bunting*, Id. 3; *Doe v. Prosser*, Cowp. 219.

GASTON, J. A proceeding for partition at law can not take

place except there be a common possession, and a common possession is always implied from a common title until the contrary be shown. But if an actual ouster be made by one tenant in common with his co-tenant, there is no longer a common possession, and the remedy is not by petition for partition, but by ejectment to recover possession of the individual moiety. The sole enjoyment of the property by one of the tenants is not, of itself, an ouster, for his possession will be understood to be in conformity with right, and the possession of one tenant in common, as such, is in law the possession of all the tenants in common. But the sole enjoyment of property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such sole enjoyment; and this not because it clearly proves the acquisition of such a right, but because, from the antiquity of the transaction, clear proof can not well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims, when the testimony to meet them can not easily be had. Where the law prescribes no specific bar from length of time, twenty years have been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor. We think the judge who tried this cause was correct in charging the jury that the twenty-one years exclusive possession of the defendant and her deceased husband, since the petitioner became discoverd, did raise the legal presumption of an ouster; that the verdict of the jury upon that instruction was right, and that there is no error in the judgment which was rendered against the petitioner.

The judgment of the court below must be affirmed, with costs.

By Court. Judgment affirmed.

WHAT WILL CONSTITUTE AN OUSTER: *Hartman v. Gartman*, 18 Am. Dec. 656, and note, and *Gibson v. Vaughn*, 23 Id. 143.

ONE CO-TENANT MAY MAINTAIN EJECTMENT AGAINST THE OTHER after demand to be let into possession: *University v. Reynolds*, 23 Id. 234.

ADVERSE, PEACEABLE AND CONTINUED POSSESSION OF LAND, for a period of thirty-eight years, is sufficient to establish the presumption that such possession commenced under a lawful title: *University v. Reynolds*, 23 Id. 234.

THE PRINCIPAL CASE IS CITED AS AUTHORITY for the proposition that an ouster will be presumed from a sole occupation of twenty years or more, in *Baird v. Baird*, 1 D. & B. Eq. 524; *Northcott v. Casper*, 6 Ired. Eq. 303; *Purvis v. Wilson*, 5 Jones, 22; *Black v. Lindsay*, Busb. 467; *Day v. Howard*, 73 N. C. 1; *Covington v. Stewart*, 77 Id. 143.

COOPER v. CHAMBERS.

[4 DEVEREUX LAW, 261.]

A PROMISE TO PAY THE DEBT OF ANOTHER is not within the statute of frauds, where it is upon an original consideration of benefit or harm, moving between the newly contracting parties.

A PROMISE TO PAY A FIXED DEBT "IN TRADE" does not sound in damages, and is within the jurisdiction of a single magistrate.

ASSUMPSIT. The case was originally commenced by warrant, before a single magistrate, whence it was appealed to the superior court. The promise by defendant was to pay the debt due by one Starns, to the plaintiff, and also the attendant costs, provided plaintiff would release Starns from imprisonment under a *ca. sa.* issued against him at plaintiff's instance. This plaintiff did. Upon appeal to the superior court, defendant resisted plaintiff's claim upon the ground: 1. That the parol promise to pay the debt of a third person was not valid. 2. That the action sounded in damages, and was not therefore within the jurisdiction of a single magistrate.

DANIEL, J. The first objection made to the plaintiff's recovery is, that the action is founded upon a parol promise or agreement to pay the debt of another.

By the act of 1826, c. 10, it is declared that no person shall be charged upon a special promise to answer the debt, default, or miscarriage of another person, unless the agreement is reduced to writing and signed by the promisor or his agent. But when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties, the case is not within the statute: 1 Saund. 211, note a; 8 Johns. 39. This is a case of that description; the consideration to support the promise was the injury or harm the plaintiff sustained, by discharging his debtor at the request of the defendant, and upon the agreement that he would pay the debt. When the plaintiff discharged Starns from prison, he was entirely freed from the debt, and the defendant became the debtor. The defendant did not derive any benefit from this agreement, but the plaintiff sustained harm by giving up those advantages with which the law had invested him, to coerce the debt from Starns. Here was a new and an original consideration, moving between the contracting parties at the time the agreement was entered into; and the case is not within the meaning of the statute. This case is very different from a collateral undertaking by the defendant;

that Starns should pay the debt or he would, or that Starns should do any other act or thing; for then such collateral undertaking would be within the meaning of the legislature, when it declares that a special promise to answer the "debt, default, or miscarriage" of another must be in writing. We think this objection can not prevent the plaintiff's recovery.

The second objection is, that the promise sounds in damages only, and was not within the jurisdiction of a justice of the peace. The debt due to the plaintiff from Starns was ascertained by a judgment, and the prison fees are fixed by law; therefore the claim does not sound in damages. The mode of payment (viz., "in trade," which I conceive to mean valuable articles of trade) is not an objection to the jurisdiction of a justice of the peace, if the value of the articles in money, at the time they were to be delivered, would be a sum within his jurisdiction. By the act of 1744, c. 13, a justice of the peace has jurisdiction of sums under twenty pounds, for goods sold and delivered, for work and labor done, or for specific articles, although due by assumpsit, and the justice may give judgment for the value. We must take it for granted, in this case, as no objection has been raised on that ground, that the plaintiff has demanded the "trade" before he brought his warrant, and that the defendant did not pay or tender any articles of value in trade, to satisfy the demand. We think this case one that is within the jurisdiction of a justice of the peace, and therefore the judgment is affirmed.

By Court. Judgment affirmed.

As to when there is a necessity of reducing the promise to pay the debt of another to writing, see *Rogers v. Collier*, 23 Am. Dec. 153, and cases cited in the note.

That a promise to pay the debt of another, not reduced to writing, is not within the statute of frauds, if there be a new and original promise moving between the parties, this case is cited in *Ashford v. Robinson*, 8 Ired. 114; *Shaver v. Adams*, 10 Id. 13; *Nicholls v. Bell*, 1 Jones, 132; *Jenkins v. Pearce*, Id. 413.

DEN EX DEM. CLOUD v. WEBB.

[4 DEVEREUX LAW, 290.]

EVERY POSSESSION WILL BE CONSTRUED to be consistent with right, unless it be shown to have been claimed and held otherwise.

THE SOLE SILENT OCCUPATION OF ONE TENANT IN COMMON, without an account to or claim by the others, is not in law an ouster, or evidence of an ouster, unless continued for twenty years.

EJECTMENT. In 1827, the lessor of the plaintiff filed a petition in partition, claiming an interest in the lands in controversy. Sole tenure having been pleaded, this action was brought. The lessor of plaintiff claimed as one of the children of Samuel Mooney, at whose decease, in 1767, the lands in controversy had descended to his children. In 1771, the shares of the other children in the estate were by them conveyed to Robert Neal. In 1772, the lessor of the plaintiff and her husband Daniel Cloud also conveyed to Neal, but at this time the lessor of plaintiff was not of age, nor was she at the time of the execution of the deed separately examined as to her voluntary consent. From the time of the execution of this last deed to the time of partition brought, Neal and his successors in interest remained in sole possession of the lands in controversy. Neal died in 1784, and the lands thereupon descended to his son Henry, who parted with them by deed in 1824, and by mesne conveyances they came to the present defendant. In 1812, Daniel Cloud died. Upon the first trial of this case, the jury were instructed that the deed from Cloud and wife was color of title, and that an adverse possession by the defendants and their predecessors in interest for seven years subsequent to the death of Daniel Cloud, would bar plaintiff. There was verdict for defendant. Upon appeal there was a new trial granted. The facts now proved were the same, with the exception that a declaration of plaintiff's lessor was now given in evidence, to the effect that the reason that she had not asserted her right in Neal's life-time, was that she had been unwilling to have any difficulty with him. The judge below being of opinion that this declaration did not materially change the case from that first proved, directed a verdict for plaintiff; defendant appealed.

Winston, for the plaintiff.

Badger, for the defendant.

By Court, GASTON, J. On a former occasion this case was brought before the court on the appeal of the plaintiff, and then the judgment rendered below was reversed and a new trial ordered: 3 Dev. 315. Upon the second trial, a verdict and judgment were rendered for the plaintiff, and it now comes before us on the appeal of the defendant. It presents in substance the same matters for consideration which were then presented and adjudged, for the judge was unquestionably correct in declaring, as he did, that Ann Cloud's declaration of her

motives for not preferring a petition for partition before Neal's death, neither proved an ouster, nor furnished evidence sufficient in law from which an actual ouster might be inferred. The law therefore applicable to the controversy must be regarded as settled by the previous decision, unless it can be conclusively shown that the former decision was erroneous. No arguments are now urged against it which were not then urged to prevent it, and a reconsideration of those formerly made does not convince us that an error was heretofore committed.

Every possession will be construed to be consistent with right, unless there be demonstration plain that it is claimed and held otherwise. When the husband of Ann Cloud died, she was unquestionably entitled to an undivided fourth part of the land, for which undivided share she has now sued; and Henry Neal was entitled to the other three fourth parts, as tenant in common with her, and Neal was then in possession. The possession of one tenant in common is, in law, the possession of all the tenants in common. One, however, may disseise or oust the others, and from the time of such ouster the possession of him who keeps out the rest is not their possession, but is adverse to their claims of possession.

The sole, silent occupation by one, of the entire property, without an account to or claim by the others, is not in law an ouster, nor furnishes evidence from which an ouster can be inferred, unless it has been continued for that length of time which furnishes a legal presumption of the facts necessary to uphold an exclusive possession. Twenty years, independently of our act of 1826, constitute that period, and about fifteen years only elapsed between the death of Daniel Cloud and the institution of legal proceedings by Ann Cloud, to have her share allotted in severalty. The act of 1826, if it were applicable to subjects of this description, does not affect the case, for that act bars no antecedent right by a less time than twenty years, if such right be asserted within three years after its enactment, and here the petition for partition was filed in a year afterwards. Besides this sole possession for an insufficient time to raise a presumption of an ouster, there is no other fact to warrant such a presumption, except the conveyances and reconveyances of a part of the land, but the case states that these were not followed by any change of possession. If they had been, a sole possession by the bargainee of a part, under a deed in severalty for that part, might and probably would amount to a demonstration plain, that such possession was a

of that part, and therefore adverse to Mrs. Cloud's claim, right to the possession thereof.

It is the opinion of the court that the judgment which has been rendered is correct, and must be affirmed.

By Court. Judgment affirmed.

See *Thomas v. Garvan*, ante, 708. This case is cited upon the point that an ouster will be presumed from a sole occupation of twenty years, *v. Lindsay*, Bush. 467; *Day v. Howard*, 73 N. C. 1; *Covington v. Stearns*, Id. 148.

SHERROD v. WOODARD.

[4 DEVEREUX LAW, 360.]

IF A DEMAND BE NECESSARY TO CONSUMMATE A CAUSE OF ACTION, the statute of limitations will not begin to run until such demand is made. THE STATUTE OF LIMITATIONS BEGINS TO RUN against the right of the creditor to enforce contribution from the time of payments made on account of the principal.

NOTICE OF PAYMENTS, for principal, is requisite before bringing suit for contribution.

ACTION, begun in 1831, for the purpose of enforcing contribution. The payments on account of which contribution was sought, had been made more than three years previously. When a demand of payment had been made within that time, the statute of limitations was pleaded. Upon an agreed statement of facts, showing them, as above, the judge below was of opinion that the statute ran only from the time that demand of payment was made. Defendant appealed.

Devereux, for the plaintiff.

Badger, contra.

GASTON, J. It has been long settled that when one of several co-sureties has been compelled to pay the debt of his principal, he has a right, in a court of equity, to call upon the other co-sureties for their contribution. This right to contribution was properly founded upon the maxim, that equality between those who are bound by identical obligations is equity, and that the creditor should be permitted, at his choice, to impose on one that he would not impose on all. In modern times the courts of law in England assume jurisdiction over such demands, upon the ground that this

ciple of equality being settled, a contract by the co-sureties to contribute according to this principle might be inferred. The courts of law, however, in this state, declined to assume this jurisdiction, considering it as belonging exclusively to a court of equity. The legislature then interfered, and by the act of 1807, Rev. c. 722, declared that when one of several sureties shall have been compelled to pay the debt of his principal, and such principal should be insolvent or out of the state, the surety so paying should have and maintain his action on the case against the other surety or sureties, for his or their ratable proportion of the debt so paid, before any court of record or justice of the peace having jurisdiction of the amount demanded. We regard this act as intended to remove the scruples of our judges, and to make, thenceforth, what had been supposed an obligation in conscience only, and proper to be enforced exclusively in a court of equity, a legal obligation, fit for the cognizance of a court of law. Co-sureties, therefore, are to be regarded as having mutually contracted to make this contribution in the event of a loss being thrown upon either, in the manner designated in this act.

It is a general rule that the statute of limitations attaches or commences its operation whenever there is a complete cause of action, and not before. If, therefore, a demand be necessary to consummate the cause of action, the statute will not begin to run until such demand is made. Thus in the case of *Topham v. Braddick*, 1 Taunt. 572, where a merchant brought an action against a factor upon an implied promise to account for the goods consigned to him for sale, to pay over the proceeds of the sales, and to deliver the residue unsold on demand, inasmuch as there was no breach of the contract until a demand, it was held that the statute began to run from that time. So if a note be made payable at a specified time after sight, or after demand, the statute does not attach until that specified time has expired after presentment. Where the note is payable upon demand, there are contradictory opinions as to the time when the statute commences its operation, though the better opinion seems to be that it commences from the date of the note, because an actual demand is not necessary to complete the cause of action. The question, then, in this case, turns entirely upon the inquiry, whether the plaintiff's cause of action was complete when he paid off the judgment, his principal being then insolvent, or was it imperfect and unconsummated until his application to the defendant for reimbursement? If

the first view be correct, he is barred by the statute; but if the second be correct, he is not barred.

We are of opinion that the implied contract between the parties was substantially a contract for mutual indemnity; and that there was a complete cause of action whenever the injury was sustained against which indemnity was stipulated. They agreed to divide the loss, if any should happen to either by default of their principal, and relief was not to be had against him, because of his insolvency, or removal beyond the reach of legal process. When all these facts concurred, then the contingency happened upon which payment of a proportionate part was promised to be made. The only difficulty which we have found in coming to this conclusion was occasioned by the consideration that, as well upon authority as upon the principles of reason and fairness, the plaintiff ought to show an application to the defendant, or at least a notice to him of the happening of the contingency, before he instituted his action. It is stated in the elementary books, and the position is sustained by judicial decisions, that in an action by one surety against another, the plaintiff must show their common obligation as sureties, the payment of the debt by the plaintiff, and an application to the defendant for the payment of his share. It is right that it should be so. The defendant may be ignorant of the default of the principal, or of the payment by the plaintiff. He may be willing to pay his part without suit; or notice may be important to him, to procure the means of reimbursement. But, on the other hand, to hold that the cause of action is not complete until after this application or notice, and that the statute does not commence its operation but from the time of such notice, would be to expose individuals to many of the mischiefs of stale demands, against which this beneficial statute intended to protect them.

Notice is required, not because the plaintiff's cause of action is imperfect, but because the matters, or part of the matters, constituting the cause of action, lie only in the knowledge of the plaintiff; as when a man promises to pay such rate for wares as any other paid the plaintiff, notice must be alleged in the plaintiff's declaration of the rate that another gave: *Com. Pleader*, c. 73. Where a man promises to pay ten pounds to J. S. upon a contingency, as when he comes from Rome, or when he marries, the right of action accrues from the happening of the contingency, and from that time the statute begins to run: *Godb.* 437; 1 *Lev.* 48; 1 *H. Bl.* 631. If the con-

tingency be one which lies as much in the defendant's knowledge as in that of the plaintiff, he must take notice of it at his peril; but if it lies more properly in the knowledge of the plaintiff than of the defendant, then, if the action be a special action of assumpsit, the declaration ought to aver that the defendant had notice thereof, and if the action be a general *indebitatus assumpsit*, such notice ought to be shown on the trial: 1 Chit. Pl. 319, 320.

It is the opinion of the court, that the judgment rendered below should be reversed, and that a judgment of nonsuit be entered.

By COURT. Judgment reversed.

The principal case has been relied upon as authority to the effect that where a surety has paid money for his principal, he may maintain an action against his co-surety without a demand, and that the statute of limitations will begin running from the time of payment, in *Ponder v. Carter*, 12 Ired. 242; *Adcock v. Flemming*, 2 D. & B. 225.

THAT WHERE ONE IS BOUND COLLATERALLY, and his liability depends upon the default of another, notice of that default ought to be given him, in *Adcock v. Flemming*, 2 D. & B. 225; *Cox v. Brown*, 6 Jones, 100; *Reynolds v. Magness*, 2 Ired. 26; *Parham v. Green*, 64 N. C. 430.

AS TO WHEN THE STATUTE OF LIMITATIONS WILL BEGIN TO RUN, see *Wals v. Shearman*, 11 Am. Dec. 624; *Robertson v. Smith*, 12 Id. 304; *Salisbury v. Black*, 14 Id. 279; *Jackson v. Johnson*, 15 Id. 433; *Wright v. Hamilton*, 21 Id. 513; *Arnold v. Scott*, 22 Id. 433; *Kerns v. Schoonmaker*, 22 Id. 757.

THAT NOTICE OF PAYMENT IS NOT REQUISITE, before suit brought for contribution, see *Ward v. Henry*, 13 Am. Dec. 122, and note.

EQUITY CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

BRAY v. LAMB.

[2 DEVEREUX EQUITY, 372.]

DISSENT OF WIDOW FROM PROVISION IN HER HUSBAND'S WILL remits her to her right of dower, which is liable neither to debts nor legacies.

LEGACY "TO BE RAISED OUT OF MY ESTATE" is chargeable upon lands devised by the will, especially where the personalty, which is inconsiderable, is given to the wife, who is appointed executrix during her life.

BILL for an account, and to have legacy raised out of the estate of the testator in the hands of the widow and other devisees. In 1829 William Guilford, by his will, which was executed so as to pass real estate, disposed of all his property as follows: "I lend to my wife Elizabeth the use of all my lands during her life, and if, at her death, she should leave an heir or heirs, lawfully begotten of her body by me, the whole of my land to descend to said heir or heirs, in equal quantities; but for want of such heir or heirs, all my lands, at my wife's death, to descend to Isaac G. Bell and William G. Bell, to them and their heirs." "I give and bequeath unto Nancy Guilford Bray five hundred dollars, to be raised and paid out of my estate." "I leave unto my wife the use of all the negroes that will fall to her by her father's will, during her natural life (which negroes are not yet divided), and at her death I wish them to go to my heirs, lawfully begotten of her body, if there are such, and for want of such heir of mine, my will is, that they go to Isaac G. Bell and William G. Bell, in equal shares." He appointed his wife executrix.

The will was proved in 1830, when the wife renounced the

executorship, and also dissented from the provision made for her, and afterwards had dower assigned to her. She had no issue by the testator. Administration with the will annexed was granted to the defendant Lamb. This suit was brought against the administrator, the widow, and the remainder-men, who were infants. The widow, in her answer, stated her dissent and the assignment of dower, and claimed to hold the same exempt from the charge of the legacy to the plaintiff. The remainder-men answered by their guardian, and insisted that the legacy was payable out of the personal estate only. A reference was made to the master, and he reported that the personalty amounted only to a small sum, all of which had been expended by the administrator in the payment of debts. He also reported that the testator had left lands, two tracts of which had been sold by the guardian of the infant defendants to satisfy judgments against them as devisees of the testator. That the remaining lands, valued at four thousand six hundred dollars, were subject to the dower of the defendant Elizabeth, and also to the dower of the widow of a former owner, and were, with the exception of those parts, in the possession of the infant devisees or their guardian. This report was confirmed, and the cause removed to this court.

Kinney, for the plaintiff.

No counsel appeared for the defendants.

RUFFIN, C. J. (after stating the facts). The only question argued in this case is, whether the legacy to the plaintiff is charged on the lands; and it has been intimated from the bar that it will probably be unnecessary for the court to proceed further than to the decision of that, as the parties will be disposed to adjust the controversy as soon as their rights in this respect are declared. We understand that the reference was made by consent to speed the cause, and without prejudice; hence, as the devisees are infants, the court has allowed the point to be treated as open, and have considered it.

The dissent of the widow remits her to her right of dower, which is held above the will, and is liable neither to debts nor legacies, and the bill must consequently be dismissed as against her.

Upon the general question, the court has no difficulty in declaring the legacy of five hundred dollars to be well charged on the real, in aid of the personal estate. It seems to us to be expressly charged. It is "to be raised out of my estate," are

the words of the testator, and include everything, and show an intention that this legacy should be raised at all events. The other provisions of the will strengthen this construction. It is true there is no residuary clause, nor are there any words annexed to the devise of the lands expressing in that part of the will that the devise was subject to this legacy. But the testator sets out with the declaration that he means to dispose of all his worldly goods, and the personalty turns out to be very inconsiderable, and except this legacy, everything given is to the wife for life, whom he appoints executrix, with remainder over to the same persons, in each disposition, and upon the same contingency. It must be taken, I think, as the executrix, whose duty it is to pay the legacy, is to have the whole profits of the estate during life, that the testator could not intend that this legacy should be allowed by her to fail, in case the undisposed residue proved deficient, but that the executrix should make it good out of other parts of the estate.

If this be true as against the wife, it is equally or more apparently so in respect to the remainder-men. This legacy is absolute, unconditional, and immediate, and is the only disposition of that kind which gives the idea that when it is directed to be raised out of the estate, the legatee is to be preferred before those to whom a remote and contingent interest is limited, but so limited that when it vests, it carries the whole estate, to the disappointment of this legatee, unless the estate vests *cum onere*. These circumstances make the intention clear, though there is no necessity of resorting to them, except as they evince that the obvious sense of the words in which the legacy is given, is the true sense in which the testator used them. We consider the charge need not be implied, but it is expressed, and so the court declares.

We do not go further at present, because the parties do not desire it. Indeed, before the court could proceed to order the money to be raised by a sale or mortgage, a further inquiry would be requisite as to the profits or the proceeds of the former sales, remaining in the guardian's hands, which may, of themselves, be adequate to the plaintiff's satisfaction. If the settling of the principle should not enable the parties to dispose of the controversy, either can bring any question forward upon a motion for further directions.

By COURT. Decree accordingly.

Cited and approved in *Biddle v. Carraway*, 6 Jones Eq. 99, and in *Deereus*

v. *Devereux*, 78 N. C. 389, on the point that a legacy to be paid out of the testator's estate, is well charged upon the land.

In *McLanahan v. Wyant*, 21 Am. Dec. 363, it was decided that when a testator blends real with personal estate the legacies given by the will are a charge upon the land. See, also, note to that case, 369, and the cases there cited.

SMITH v. BARHAM.

[2 *DEVEREUX EQUITY*, 420.]

CROPS GROWING ON LAND AT TIME OF TESTATOR'S DEATH go to the executor as against the heir, but as between the executor and the devisee, the latter is entitled to them.

EXECUTOR IS ENTITLED TO RETAIN TESTATOR'S PERISHABLE PROPERTY, necessary for the support of stock during the interval between the death of the testator and the probate of the will.

TENANT FOR LIFE MAY BE REQUIRED TO KEEP DOWN THE INTEREST out of the profits where there is a devise of lands, or a specific bequest of a chattel for life, with remainder over, and the subject is charged with debts not equal to the whole value; but the remainder-man can, in no case, require the whole profits to be applied in extinguishing the charge for the sake of saving the subject.

RESIDUARY BEQUEST FOR LIFE, WITH REMAINDER OVER, of articles that are consumed in the using, where such bequest includes other articles of a different nature, gives to the tenant for life the interest only, and the executor must sell the whole of the property, and reserve the principal for the remainder-man.

SLAVES ARE AN EXCEPTION TO THIS RULE, because they are not wasted by use, or if they are, the waste is supplied by their increase, which goes to the remainder-man.

BILL for an account and satisfaction, filed by some of the residuary legatees, under the will of John Barham, deceased, against the executors and the other residuary legatees. The bill charged that the testator died in 1825, having, by his will, directed that his debts should be paid out of such parts of his estate as he had not specifically disposed of, and "the residue, with all the lands he should die possessed of, he lent to his wife, Mary, during her life." After her death, the residue lent to his wife for life, the land excepted, was to be divided amongst his children and grandchildren, in seven equal parts. The defendants, Nicholas and William, were appointed executors, and proved the will.

The bill further charged that the testator had about twenty slaves, which formed part of the residue, and also a large crop growing, and provisions on hand, a valuable stock of horses, cattle, and hogs, farming utensils, and household furniture, all

of which, except the slaves, it was the duty of the executors to have sold for the payment of the debts. That instead of doing this, they had allowed several of the slaves to be sold under execution; that the defendant William had purchased one of these slaves, named Dave. That the executors had left the other articles, most of them perishable in their nature, in the possession of the widow, who had consumed them, or had converted them to their own use. It was also charged that the defendant William had hired out some of the slaves, or made profit from them during the life of the widow, which ought to have been applied to the payment of the debts instead of allowing the slaves to be sold. The bill claimed that he ought to account for the value of the slaves sold, for the hire received by him, and to deliver up Dave as a part of the residue. The bill further charged that the defendant, John Barham, owed the testator a large debt which the executors failed to collect, although William purchased from John his share of the negroes and the other residue, and paid him for them out of the profits of the estate, and that they were chargeable with that debt. The defendant Nicholas answered, admitting that he proved the will, but stating that he resided in Virginia, and had never intermeddled with the estate or received any part of it. The answer of William admitted the will. He stated that he had sold all the stock, farming utensils, furniture, and provisions, except what was necessary for the support of the widow, to raise funds for the payment of debts; that the widow died in 1830, and thereupon the slaves remaining unsold were divided among the remainder-men, including the plaintiffs; that this defendant then sold the articles that had been left unconsumed by the widow, and applied the proceeds to the payment of the testator's debts still unpaid. He admitted that some of the negroes had been sold under execution, but averred that the sale was unavoidable. He further admitted that he had purchased Dave, but had paid a full price for him, and submitted to have the purchase declared void at the election of the plaintiffs. He also admitted that he had hired out some of the slaves, but claimed that the widow was entitled to the hire, and averred that he was ready to account with her representative.

In regard to the debt of John Barham, the answer stated that the defendant found among the testator's papers some evidences that he had paid money for his son John several years before his death; that being unable to ascertain whether or not his testator had been repaid, he had sued out attachments

against John, who resided out of the state, John's share of the residue and on a slave sold to him; that judgments were had, a sale defendant William became the purchaser purchase for the benefit of the estate, and should be so considered, if it was to stand,erty himself, as the plaintiffs might elect. that he had recently discovered that the d not due; and that the whole proceeding wa take; that at the time of the purchase he l sion that it might turn out so, and that it v if it did, the purchase should inure to the b brother John; that John had since declar nothing due, and had instituted proceeding ments reversed. The defendant submitted the estate for the benefit of the party in w was found to be.

John Barham's answer alleged that he did anything, and the proceedings which had be were null, and claimed his share of the claimed that the hire of the slaves and the property that had accrued during the life the proceeds of the crop growing at the t longed to the tenant for life. A referenc master, and he reported a balance against t thousand one hundred and fifty-four dolla cents, exclusive of interest. In arriving a charged the defendants with the hire of the life of the widow, and also with the sales of t the time of the testator's death, and with property not sold, but consumed by the w report on John Barham's debt, because ther at law pending to vacate the judgments a debt, if any. He also charged defendant price of Dave. Both parties excepted to the

Devereux, for the plaintiffs.

Attorney-general and Haywood, for the exe

RUFFIN, C. J. (after stating the facts). ' on the land at the time of the testator's executor as against the heir, but as bet and the devisee, the latter is entitled to t takes the land, by the intention of the t

thing on it; for as the devise carries the land against the heir, so it does the crop as against the executor. The rule is so strong that if the devise be for life with remainder over, and the first taker die before severance of the crop growing at the death of the testator, it goes over with the land to the remainder-man in preference to the personal representative of the first taker.

Here the testator died early in September, 1825. He then left in the granary a small quantity of corn and wheat, not more than sufficient to support the stock and negroes until the executors could, at the next court, prove the will, and get authority to sell. It is in evidence that it was not sufficient; for a considerable portion of the growing crop was used for that purpose. Now, although it may be the duty of the executor, upon a will like this, to sell all the perishable property, and invest the proceeds for the security of the fund, for the remainder-man, paying the interest, as the profits, to the legatee for life, yet some time must be allowed to make it, and in the mean while the stock must be supported and kept fit for sale, and the slaves fed. The executor ought not to sell until probate, to obtain which he is obliged to wait for a court. It is the interest of all concerned that the support should be drawn from the property itself until the sale is made in seasonable time. Here it was in December, 1825, about one month after the probate of the will. The exceptions of the defendant to so much of the report as charges the executors with thirty bushels of wheat on hand is, on this ground, allowed. And the exceptions to so much of the report as charges them with the corn and cotton growing at the testator's death, is also allowed.

In the account, a particular quantity of corn, eighty barrels, is charged as a distinct item at three hundred and sixty dollars, and also of fodder, ten stacks, at twenty-five dollars, which is seen at once. But the cotton does not explicitly appear upon the report. There is a charge for one bale as an item in the account, being, as the master states, a part of the crop not sold, and put down at the price of thirty dollars. But the principal part of this charge is in the general item of "amount of sales" one thousand nine hundred and sixty-seven dollars and ninety-three cents, which, upon a reference to the account of the sales, obtained from the county court, which was the evidence on which the master acted, is found to include nine thousand two hundred and sixty-three pounds of cotton, disposed of at the general sale by auction, at three hundred and five dollars and

sixty-eight cents. It appears upon the proofs, that this cotton, fodder, and corn was on the land when the testator died, and was gathered by the executor and widow. To the latter they belonged, and to her the executor is accountable, and not to the residuary legatees in remainder.

The same is true, also, as to the charges of the hire of the slaves which belong to the widow. When there is a devise of lands, or a specific bequest of a chattel for life, with remainder over, and the subject is charged with debts not equal to the whole value, the tenant for life may be required to keep down the interest out of the profits, or the parties are required to raise the principal by contributions in proportion to the value of their respective interests. But certainly in no case can the remainder-man require the whole profits to be applied in extinguishment of the charge, for the sake of saving the subject, for that would defeat the life estate altogether. But in a residuary bequest to one for life, and then over, the whole is subject to the immediate payment of debts, and the executor may and ought to sell enough for that purpose in the first instance. For it is only what remains, after payment of debts, that is given, either for life or over. So much of the capital is to be sunk at once. Here it has been done by the sale of a part of the consumable articles, and a part of the slaves; and the plaintiffs say that was wrong, and so the master finds, because there were sufficient profits of the unsold slaves to answer that end. That position can not be maintained. These profits are the use given to the tenant for life. The exception to these charges in the account must therefore be allowed.

The master has also charged the executor with twenty-eight shoats, thirty-five fat hogs, six sheep, thirty gallons of brandy, and some casks and hogsheads, of the value altogether of two hundred and sixty-one dollars. He has also charged them with the value of some household furniture, not sold, either at the sales after the death of the testator, or after that of the widow, to the value of fifteen dollars. The executors except to these charges, upon the ground that these articles were necessary to the support of the widow and the family, and in order to keep up the plantation. The argument on the other side is, that these articles should all have been sold, and, if necessary for that purpose, the proceeds applied to the payment of the debts, or, if not thus needed, invested, and the interest only paid to the widow for life; and therefore that the executors are chargeable with their value.

We believe the common understanding of testators in the country is with the defendants; for they can hardly be supposed to give to their widows lands and negroes for life, and to intend to strip the plantation. But we believe likewise that the law is clearly with the plaintiffs on this point.

Where there is a gift of a specific chattel for life, and then over, the executor may assent to the legacy and discharge himself from liability to the remainder-man, by delivery to the tenant for life, for the assent to that legacy is an assent to the one in remainder. It was formerly held, indeed, that the executor would be bound to the remainder-men, unless he took security from the tenant for life that the thing should be forthcoming at his death. But unless there be collusion, it is now held otherwise, and the tenant for life is only bound to give a receipt, or sign an inventory, as it is called, unless there be reason to believe that the article will be destroyed or sent away—in which case the executor may refuse to deliver it without security, or the remainder-man may, after delivery, file his bill for security: *Foley v. Burnell*, 1 Bro. Ch. Cas. 279. In such cases, the remainder-man must be content to receive the article as it ought to be left by the first taker, after using it with ordinary care and prudence. When, however, there is such a specific gift of what we commonly call, and what the master here calls, “perishable articles,” or of what are embraced under the description in the books, of “articles *quæ ipso usu consumuntur*,” it is difficult to say what is meant. I rather think testators seldom do mean to give such things for life only, and that those words are annexed by mistake to that gift, by inadvertently inserting it in the clause giving other things of a different kind, and which are meant to be for life only.

But if the testator really intends such a gift to be for life, we can hardly imagine what rights of enjoyment he meant for the objects of his bounty respectively. For to give wine, corn, sheep, or cattle for life, is to give the whole, if the legatee is to have any use of it, since the property, nay, the consumption, is inseparable from the use; unless the testator has this further meaning, that the tenant for life may consume and sell, as he would himself if living, and that whatever is left, both of the original stock and the increase, shall be taken as the estate of the testator, and go to the remainder-man. I rather suppose that this is the meaning, for such dispositions are generally found in the provisions for wives, to whom children are to succeed, and the testator supposes that the mother would wish them to take

all, whether it be his or her estate. Thrown up from the rule of our law respecting slaves given for life, all the articles being in the same clause. But to the admission of such is the insuperable objection, that it is against the ancient rule of the common law that the income of the property belongs to the tenant for life, and therefore belongs to the tenant for life if it accrued; to which slaves constitute the exception. We would not feel authorized, upon the testator's intention, to carry it farther. The respective interests of the tenant for life and the consumable chattels specifically bequeathed in the will, it is far from clear. We do not know the courts upon the point. In England it is so. In *Foster v. Tournay*, 3 Ves. 311, Lord Almon and the learned judges had thought the articles not given to persons entitled to the limited use have only been thought very rigid. Yet in *Randall v. Randall*, Sir William Grant, taking notice of that case, says his conception is, that a gift for life, if specifically given in things, "*quæ ipso usu consumuntur*" comes within the reason of the old law, that the limitation over of a chattel after a life estate should be otherwise when such articles are included in the bequest, with others of a different nature, the whole are to be sold by the executor, and the proceeds divided by the tenant for life. That is the case, and therefore further speculation upon the question is unnecessary.

It seems clear, that when a residue is given to be sold by the executor. The several things of the testator supposing them not worth giving, knowing how much, or which of them, are necessary to sell for payment of debts and the residue. The gift is then of the net balance of the property after debts are paid, which implies a sale. In the case when there is an immediate gift of the property after debts are paid, it must be when there is a surplus to one for life, and then to the next of kin. It is nothing to show that, as to the consumable property, the testator meant to give the particular legatees in consumption, and as they are co-heirs with the others of a different nature.

together, and as a part must be sold, the whole must, and the first taker have the profit only. For upon the intention it is taken that the benefit is to be divided between the legatees in the whole subject, which can not otherwise be; for if the tenant for life does not use the perishable articles, he gets no benefit, and if he does use them, the legatee over gets none. Such parts of the exceptions as relate to these articles must, therefore, be overruled. The executor is properly charged with the value of them in this suit, and as the widow had the benefit of them, he will be entitled in the settlement he will make with her representative, to the value now answered for by him, as a credit against the charges against him for her cotton sold by him, for which he has by this decision credit in this suit.

To the rule thus laid down, slaves are an acknowledged exception, founded on the known expectations of testators, and the general understanding of the country, and the profession. Indeed, the reason of the rule itself constitutes them an exception. They are not wasted by use, and if they are, that waste is supplied by their issue, which, it has long been held, goes with the remainder. With respect to them, service, and not increase, is the use of the tenant for life. When, therefore, they are included in a residue with other things, they are to be treated as they generally are when left by an intestate, not sold, as other parts of the estate, but divided amongst those entitled, unless a sale be necessary for debts or distribution.

The defendant William having submitted to have his purchase of Dave declared void at the election of the plaintiff, it would be, of course. But the master has charged the price of him, which is proved to be a full one, in the account, and it has been paid in discharge of debts, and the plaintiffs have taken no exception upon that point, which is an election, and binds them.

The result of these views is, that a balance is found due to the executors, as far as the accounts have been stated, and the bill would be dismissed, but that the plaintiffs may wish a further inquiry upon the subject of John Barham's debt. For that purpose the cause will be retained; but if no motion for further directions be made by the plaintiffs, on or before the calling of the case at next term, the bill will be dismissed afterwards, when moved for by the defendants.

By Court. Order accordingly.

N. C. 379, 380, to the point that a residue for life ought to be sold by the executor, and the interest for life, and the principal retained for the remainder-man 1 Dev. & B. Eq. 94, in *Jacocks v. Bozeman*, Id. 194, and 1 Ired. L. 88, to the point that slaves are an exception *son v. Corpenning*, 1 Ired. Eq. 219, to the point that a vest, by assent of the executor, in the tenant for life and in *Blount v. Hawkins*, 4 Jones Eq. 164, to the point that life must keep down the interest.

GILLIS v. MARTIN.

[2 DEVEREUX EQUITY, 470.]

APPELLATE COURT IS CONFINED TO PROOFS upon which for error was founded.

ANSWER, AFTER REPLICATION, IS NOT EVIDENCE for which is made so by discoveries called for in the bill.

SALE, ACCOMPANIED BY AGREEMENT TO REPURCHASE proper case, but the court watches such agreement to be securities, unless a contrary intention is manifest.

DEED, ABSOLUTE IN FORM, WHEN TREATED AS AT the time of the delivery of an absolute deed to a written agreement, stipulating that, if within a certain time should be sold for more than the amount of the principal interest and cost of necessary repairs, he would grantor, such deed will be treated as a mortgage to show that it was otherwise intended by the parties.

RIGHT TO REDEEM CAN NOT BE BARRED by any agreement in the contract, that the purchaser should, in default of redemption, be absolute owner, if the subject was once redeemed.

MORTGAGEE IN POSSESSION IS ENTITLED to his expenses in the interest thereon.

GENERAL RULE IN CASE OF NEW IMPROVEMENTS is to throw difficulties in the way of redemption.

IMPROVEMENTS, PERMANENT AND BENEFICIAL, WHICH would be wholly unproductive, and which were made in the belief that the estate was his own, will be allowed.

MORTGAGEE SHOULD NOT BE CHARGED WITH REPAIRS or improvements that he himself has made.

SALE IS DECREED UPON A BILL FOR FORECLOSURE when, if a sale will not be decreed, unless upon a bill for redemption.

BILL filed by the widow and heirs of Gillis of a town lot in Lawrenceville, and a bill was filed by him to the defendant by an absolute deed alleged that this deed was intended only for the sum of one hundred and sixty-nine dollars,

been discharged by the profits which had come, or ought to have come, to the hands of the defendant. On the same date that the deed was executed, the defendant entered into a written agreement, in which he stated that he had purchased the premises at the price of one hundred and sixty-nine dollars; but that if sold within two years for more than that sum and the interest on it, and such necessary repairs as might be made on the house, he would pay the surplus to Gillis. The answer admitted the agreement, but denied that the deed was merely a security, and alleged that the purchase was absolute. The defendant alleged that Gillis was indebted to him in the sum of sixty-nine dollars, to secure the payment of which he had executed to him a deed of trust for the premises in dispute; that Gillis being about to remove to Alabama, and being unable to sell to anybody else, induced the defendant to purchase, and give one hundred dollars more than his debt, which was the full value; that defendant thereupon surrendered the deed of trust, and took an absolute conveyance; that after the completion of the contract and the execution and delivery of the deed, Gillis stated that his family might not be satisfied with the price, and requested the defendant to agree to sell the premises and pay him the surplus, which he readily agreed to do, as he had made the purchase to oblige Gillis; but that it was never understood that the agreement should be connected with the deed, or give a right of redemption, or change the deed from an absolute one, or have any other effect than to bind him to pay over the surplus, if any, upon a resale; that the defendant made repeated efforts to sell, but was unable to do so at any price; that the house having become untenable, he had repaired it, and thereafter occupied it himself, and had since made such repairs and additions as were necessary to the comfortable occupation of the premises by his family; and that those repairs and additions were made by him in the belief that the absolute property was in himself.

There was a general replication to the answer, and upon the hearing the judge made a decree declaring that the plaintiffs had a right to redeem, and referred it to the master to take an account of the sum due on the mortgage, including necessary repairs, deducting therefrom the rents and profits. The master reported, submitting two views; in the first, he gave the defendant credit for repairs made within the two years named in the agreement, and charged him, after the subsequent improvements, an improved rent, upon which he found a balance due

to the defendant of forty-four dollars and in the second, he gave him credit for all the improvements, and charged the like rent, upon a balance to be seven hundred and forty-six dollars and cents. The master reported that all the repairs were necessary for a convenient and repair of the premises, and were made with the report was confirmed *pro forma*, according to the report submitted by the master, and a decree pronounced by the court from which the defendant appealed to this court.

No counsel appeared for the plaintiff.

Mendenhall, for the defendant.

Ruffin, C. J. (after stating the pleadings as set forth). For the defendant it is insisted that the same are erroneous, for that the purchase was absolute, and that the defendant had a right to make the improvements in all events, is not to be charged with rents as a tenant.

The case is not free from doubt upon the first question. The character of the conveyance is to be determined by the parties; and if that, however ascertained, is to operate as a security, the court so regards it, and will be entitled to redeem. The difficulty is in ascertaining the intention. Here the instrument conveys to the plaintiff a defeasance, is admitted in the answer, and the defendant denies that it was given with the view of converting the purchase into a security. For the purpose of supporting his assertion, he states that the price mentioned in the deed was one; that he then gave up a former and more valuable lot for the debt which Gillis owed him, which he did not do if he had considered that he was only giving up the lot for that and the additional sum then paid, and that he was about removing to distant parts, and had no intention to wish to redeem the premises, and therefore could not have stipulated for it. These circumstances are strong to repel the inference from the words of the deed, if they appeared in a way for the court to take notice of. But they do not. It nowhere appears that the deed was a deed of trust.

It is true, that upon the evidence before the court, in taking of the account, it appears that one hundred and nine dollars was the full value, and that Gillis

move to Alabama. But the court is confined, on an appeal, to the proofs upon which the decree impeached for error was founded. When the decree for redemption and an account was made, there were no proofs but the exhibits and the defendant's answer; and the answer, after replication, is not evidence for the defendant, except as it is made so by discoveries called for in the bill, and which are responsive to direct charges, or special interrogatories. Here the bill charges nothing but the execution of the agreement, which is appended to the bill, by force of which alone the right to redemption is claimed, and interrogates the defendant as to its execution. That the answer admits. The other circumstances brought forward in the answer are new matters, and must therefore be proved by the defendant before they can vary the decree.

Confining ourselves to the instrument itself, the first decree pronounced in the superior court seems to us to be correct. The transaction can not be regarded as a sale, accompanied by an agreement for a repurchase by the vendor, upon which he must come strictly within time, for nothing of that sort is pretended on either side. If it were so, it would be supported, though the court watches such agreements, and construes them to be securities, unless a contrary intention be manifest from the circumstances: *Poindexter v. McCannon*, 1 Dev. Eq. Cas. 373 [18 Am. Dec. 591]. But here no payment by Gillis is stipulated for, to be made at any time, as a price for the land. But it is contended the agreement was not for redemption, which might be had at any time, but that an eventual arrangement of property was contemplated, and that this was at least a conditional sale, to become absolute in the defendant, in the event he did not sell to another within two years. It is difficult to say that, on the face of the papers. An interest is reserved to Gillis in the sum that might be got for it, upon a sale to another, which is the surplus, not above a particular sum *in numero*, but above the advances then, and the disbursements on the property, and interest. The question is, does this show that the object was primarily to secure those advances, for, if it does, then redemption and all other incidents of a mortgage follow. To us the affirmative seems true.

It can not be doubted, that if the defendant had sold, he would have been obliged to pay the surplus to Gillis; nor that if Gillis had, within two years, tendered what was due, he would have had a right to a reconveyance, and that, not upon the ground of a stipulation to that effect—for there is none such in

seeing that since he was to have the surplus interest was limited to the sum due him, and was the real owner. Besides, upon a settlement or after a sale, what is made the basis of it? Interest, and the outlays for necessary repairs, and the defendant then does not go into possession, nor actually do, and erect or pull down buildings, and restrains himself to necessary improvements, and he is to keep accounts against either the defendant, which we think, in the absence of evidence to the contrary, the estate and all other circumstances, is of the character of the conveyance originally. In such a security, it remains so in the hands of the defendant, and would be otherwise in the hands of a bona fide purchaser with notice, upon the score of a personal covenant of the defendant to make a sale, and receive the purchase money, application of which the purchaser would then be bound to see. But no agreement, at the time of the sale, that the purchaser shall in default of the debtor become a mortgagee, even at an increased price, is permitted by the law of redemption, if the subject was once redeemable: 1 Vern. 488; *Seton v. Slade*, 7 Ves. 273.

The last decree was merely formal, and made to enable the parties to bring the case to a final revision. We think it too rigorous towards the defendant under the circumstances of the case. Every mortgage, if not bound to repair, is at least entitled to a right of redemption, and they form part of the interest runs: *Godfrey v. Watson*, 3 Atk. 501. As to other outlays for the preservation of the estate, the law is otherwise, but is not unyielding: 4 Kent Com. 466. The court is as necessary to protect the mortgagee, and from having increased difficulties through the law of redemption. The creditor is not, therefore, to be put out of his estate. But where the mortgagee is in possession, not only by the consent, but by the necessity of the mortgagee, and the improvement is necessary and beneficial, and without it the estate is unproductive, so that the mortgagee, as a prudent owner, would make it if he were himself in possession, and really made it under the belief that the estate

that he was rendering the property more valuable as for himself, and not with a view of bringing the expense into account against his debtor, there seems to be a ground for repelling the application of the rule. The principle upon which it is founded does not reach such a case, which stands rather on another, that he who takes benefit by the labor or money of another person, not laid out against his will or his interest, shall make compensation. Upon this ground, improvements were allowed for by this court in *Bissell v. Bozman*, when last before us, because they were proper, and Bozman, at the time of making them, deemed himself the owner, and it was held to be otherwise only upon a nice legal construction.

There is no doubt upon the evidence before the master in this case, that either the defendant's was a purchase, or that he conceived it, and with much reason, to be so; and that he acted with good faith in his endeavor to sell before he laid out more money, and also in making his expenditures. It is in proof that the sum he advanced was a full price; that the debtor was then removing, and did remove to Alabama, and therefore had no actual intention to redeem, but expected at most a sale, and that he could not get a tenant at any price without improvements, and that all which the defendant made are absolutely necessary to make the place even comfortable. These circumstances seem to render the case peculiar, and to entitle the defendant to be protected in his expenditures, for as they were incurred honestly, he may claim at least to be a bailiff or steward, endeavoring to serve the owner, instead of a creditor, striving to make a pledge his own property. Moreover, the difference is not very great, for the first view taken by the master could not possibly stand, since it charges the defendant with a rent the premises ought to bring both under the repairs and improvements. The rent thus given exceeds the interest upon both the debt and the repairs and improvements, and the proof is, that if repairs alone had been made, no tenant could have been had. The whole rent is therefore justly attributable to the improvements, and will nearly discharge the cost of them, so as to make the balance of the account consist almost entirely of the debt, repairs, and interest, for which the mortgaged premises are undoubtedly answerable. But we think the case upon its own circumstances forms an exception, if any can, which appeals to the sound discretion of the court to make those allowances upon the footing of fair dealing between these parties; and as no exception is taken to the estimates of the master, as contained in

either view submitted by him, but only to which they are respectively based, the former reversed, and the report of the master finding the defendant, on the fifteenth day of March hundred and forty-six dollars and fifty-five in the account annexed to the report, must decree made accordingly—that the plaintiff defendant within four months from the day of the decree, together with the costs of his suit in the cause, upon such payment being made by the plaintiff widow, that the defendant convey the premises to her by way of assignment of his title to her; or if the payment be made by the plaintiff, the defendant do convey to the plaintiffs, John and Eliza M., the children and heirs at law of the defendant, and in default of such payment, the bill to be dismissed.

Upon a bill for foreclosure, the practice has been to decree a sale, as being more advantageous to the creditor, and as the creditor is seeking in that suit to satisfy his debt. But upon a bill to redeem, a sale is not decreed except upon consent, because the mortgagor is not compelled to relinquish the estate upon a redemption, but may receive his whole debt, which he might do by the reception of the rents, and may not by a sale: 6 Ves. 573.

By COURT. Decree reversed.

Cited in *Lyerly v. Wheeler*, 3 Ired. Eq. 601, and 6 Jones Eq. 77, to the point that an answer, after a bill for redemption, is not to be taken for the defendant, except as it is made by discovery of the facts, and which are responsive to direct charges or specific allegations.

ABSOLUTE DEED AND AGREEMENT TO RECONVEY.—*See* 20 Am. Dec. 277, and note 300.

ABSOLUTE DEED, WHEN TREATED AS MORTGAGE.—*See* 20 Am. Dec. 145; *Harbison v. Lemon*, 23 Id. 376.

RIGHT TO REDEEM, RESTRICTION ON, VOID.—*See* 20 Am. Dec. 722, and note 727; *Johnston v. Gray*, 18

CASES
IN THE
SUPREME COURT
OF
OHIO.

GREEN v. DODGE AND COGSWELL.

[6 OHIO, 80.]

NEGLIGENCE OF THE COMPLAINANT in preparing or conducting his defense at law, precludes him from obtaining relief in equity from the judgment entered against him.

JUDGMENT WILL NOT BE RELIEVED AGAINST because the complainant incorrectly stated his case, or made a false admission in the former action.

THE ASSURANCE OF THE JUDGE that a judgment should be different from that which was afterwards rendered and entered, can not be relied upon in equity as a ground for decreeing a new trial.

SURETY RECEIVING MONEY OR CLAIMS to be applied to the payment of his principal's debt, holds as trustee of the creditor, and must account to him.

BILL in chancery for a new trial and general relief, from which it appeared that the complainant, Daniel Green, brought an action against the defendants, John Dodge and Eli Cogswell, on their indorsement of certain notes; that this action was submitted to the court on an agreed statement, which among other matters stated that no consideration passed "from Green to Dodge and Cogswell, on account of said notes;" that on account of this statement and certain defects in the declaration, judgment was given for defendants; that complainant's counsel did not properly state the facts in his declaration, nor in the agreed statement; that before the decision his counsel was informed by the judge that the complaint would be held insufficient, and then asked leave to amend; that the judge said the judgment would be so drawn as to be no bar to another suit; that counsel was called from court by illness in his family, and did not return till after the adjournment, in conse-

quence of which he did not notice that judgment had been so entered as to be a bar; that the court, at a subsequent term, denied a motion to amend, for want of power; that complainant sued John Dodge on the same claim, but was held to be estopped by the former judgment, etc. To this part of the bill defendants demurred.

The bill also alleged the receipt by defendants of certain funds and demands to indemnify defendants as sureties. The defendants admitted the receipt in 1823, by John Dodge, of sundry demands from Sydney Dodge, to be handed over to complainant, in payment of the notes; that complainant selected two of these demands, amounting to five hundred and fifty-three dollars and eighty-one cents; and that John Dodge afterwards collected two hundred and twelve dollars and two cents more, which had never been demanded of him.

Nye and Goddard, for the defendants.

Hunter and Stanbery, contra.

By Court, WRIGHT, J. Two points are made on this demurrer: 1. That the matters set forth in the bill are of exclusive legal cognizance, and have been tried and determined at law. 2. That no fraud or accident, within the jurisdiction of the court, is shown in the bill; but, on the contrary, it is shown that, if the complainant ever had a meritorious case against the defendants, he has lost it by his own negligence, or that of his agents.

This court has determined in *Lieby v. Heirs of Ludlow and Parks*, 4 Ohio, 492, that it is not proper for a court of equity to inquire whether a court of law, in a matter within its jurisdiction, erred in opinion, nor whether a fair and impartial trial has been had at law, unless the complainant clearly shows that he had a good defense, and was prevented by fraud, or pure accident, without any fault or negligence of himself or his agents, from availing himself of it: *White v. Bank of United States*, 6 Ohio, 530. The present chief judge, in giving the opinion of the court in that case, p. 493, uses the following language: "Should this court enjoin this judgment, and order a new trial at law, because a fair trial had not been had, it must order a new trial in every case where the defendant may, in general terms, allege fraud in the plaintiff, in obtaining the verdict against him, and that there existed evidence which would probably change the verdict. From their feelings, defendants would do this with a pure conscience in most cases where verdicts are against them. Hence, courts of chancery,

before they order a cause to be reheard at law, require that the complainant shall show that he used due diligence in preparing and conducting his defense at law, and that he was prevented from making them by circumstances beyond his control."

The same doctrine is recognized by the supreme court of the United States, in *Marine Insurance Company v. Hodgson*, 7 Cranch, 336. Chancellor Kent, in *Duncan v. Lyon*, 3 Johns. Ch. 356 [8 Am. Dec. 513], lays it down as "a settled principle, and one by which he intends to continue to be governed, that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report on facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence on his part." In *Curtis and Williams v. Cisma*, 1 Ohio, 435, this court determined it not to be a subject of inquiry in chancery, whether the decision of a court of law, upon a subject within its jurisdiction, was or was not correct. In that case, it is said that "a court of chancery does not act as a court of errors, to examine or reverse the judgments of a court of law." And again, "where courts of law and of chancery have concurrent jurisdiction, and a party electing to pursue his remedy in one, fails, he shall not be permitted, as a general rule, to resort to the other." This court also, in *Buell v. Cross*, 4 Ohio, 330, determined that where a party has remedy at law, in the prosecution of which he has been defeated by an erroneous decision, he can not be aided in equity. "If he properly failed," say the court, "his rights are at an end; if improperly, his remedy was by error." With these decisions upon the point, one would suppose the profession would consider the question settled; at any rate, this court is satisfied with the decisions, and is not disposed to alter them.

It is insisted by the counsel for the complainant, that these matters will not avail the defendants on demurrer, but should have been set up by plea; and that they can not even be pleaded without a denial of the fraud, or other circumstances. Reliance for this is had upon Mitford's Pleading, 206-208; whereupon it is urged, that inasmuch as in this case there is no denial of the circumstances and mistake, they are all admitted by the demurrer, and so are to be held available. We do not apply the law as the complainant's counsel do. The true inquiry is: are the circumstances admitted by the demurrer, such as, according to the course of proceeding in chancery, to en-

title the party to relief. Apply this rule. No fraud is alleged, except the fraud of the found a verdict, acting as a jury against the according to his own agreed state of facts. Judgment is rendered upon this finding, according to the court. It is complained of this, that the declaration was not the true one, but made by the complainant's attorney, because more convenient to state his facts in that manner than stated all the law required. If this be the stance relied upon, it is the fault of the counsel. This court will not afford him relief.

Again, it is complained, that the ground of the want of an averment of consideration when in truth there existed a consideration been averred. The agreement of facts admits, "that no consideration passed from and Cogswell, on account of said note." Can he admit a falsehood to get his cause tried? and to be relieved from his false admission?

It is still further objected, that the court judgment, assured the attorney that it should operate as a bar, when, by mistake, the judgment was entered. It is believed this is the chancery, to set aside a judgment at law for misrepresentation in the court rendering it. What are the alleged circumstances? The counsel amend after the cause was submitted; and the counsel asking leave, that the judgment should in no way not to operate as a bar. The parties agreed to their cause, upon agreed facts, to the court. The court found a verdict for the defendant. Upon which judgment followed of course, the court asks to set aside the judgment, because the counsel choose to move for a nonsuit, or in arrest of judgment. His own counsel stated a fictitious instead of the true facts, because the court, without motion, in conformity with that the judgment should be entered so as to operate as a bar, because, upon some unknown ground, the court took motion to amend the judgment at a subsequent time. *v. Dodge*, 3 Ohio, 486. These facts, it is taken as true, because admitted by the defendant.

A demurrer admits only what is well pleaded.

court acts upon matters before it; it can hold no conversation; it enters into no contracts to do business, and it can only speak by its record. The legal maxim is, that they import absolute verity, and can not be contradicted; hence a claim to set up facts in opposition to the record, as in this case, has no legal effect, even if demurred to. The conversation, if any, in this case, must have been with a judge of the court, not the court; and if he undertook to take care of the complainant's rights, it was as his agent, and his laches, like that of other agents, are chargeable upon the principal.

The analogy claimed to exist between this case and that of *Oliver & Baum v. Pray*, 4 Ohio, 175, is not perceived by us. The judgment in that case was deemed unconscionable, and the mistake on which relief was given, was that of the clerk, in the discharge of his duties, as an officer or agent of the law, in taking the appeal bond, when the complainants, so far as they were in pursuit of their legal rights, acted "with perfect good faith, and with all reasonable diligence;" p. 194. That case goes as far as we are disposed to go. The demurrer is therefore well taken.

On the merits, the case made lays no foundation whatever, for a decree against Cogswell, and as to him, it is dismissed with costs. John Dodge, it appears, received from Sydney Dodge certain claims, to be applied to the extinguishment of the complainant's debt, a part of which only have been so applied. He admits the receipt of two hundred and twelve dollars and two cents, which remains unapplied; and he holds this money, and the uncollected demands, in trust for the complainant. The exact state of the outstanding demands is not made known to us; nor are we advised when the two hundred and twelve dollars and two cents were received, or might have been paid over. A master will, therefore, unless the parties agree, be required to take and state an account of this fund, showing the amount received, the date of the receipt, and the time when it might have been paid over; also, the present condition of the remaining claims, and if any, what portion of them have been lost by the negligence of John Dodge.

The cause must be continued for further proceedings.

Cited in *White v. Bank United States*, 6 Ohio, 530, upon the principle that equity will not relieve against a judgment at law, obtained through the negligence of the complainant's counsel. Also in *Dickson v. Rawson*, 5 Ohio St. 223, upon the point that securities given by a debtor to a surety to dis-

JUDGMENT AT LAW, WHEN RELIEVED AGAINST IN EQUITY, has been considered in the following cases in this series: *Tunnicliffe v. C. Fry*, 6 Id. 654; *Poindexter v. Waddy*, 8 Id. 749; *Pray v. Oliver*, 19 Id. 603, note; *Crane v. Conkling*, 20 Id. 101.

SMITH ET AL. v. HEUSTON ET AL., OF BUTLER COUNTY.

[6 OHIO, 101.]

PUBLIC SQUARES—PRIVATE INDIVIDUALS can not sue against the county officers, to enjoin them from using a public square, which it is alleged will result in a forfeiture of the square, and an injury to the complainants.

BILL for an injunction to prevent the commissioners of the county, of a certain square "for the use of public buildings for the county of Butler;" that the commissioners of the county, on the square; that complainants, and deprive the inhabitants of the square, have resolved to lease the corner of the square for private purposes; that such leases, if made, will result in a forfeiture of the square to the heirs of the donor, etc. The defendant

J. Woods, for the defendants.

A. H. Dunlevy, for the complainants.

By Court, **WRIGHT, J.** Unless the complainants, as individuals, to interfere to protect the property conveyed to it for the use of public buildings by the county commissioners, the agents of the county, such property as in their judgment may be for the benefit of the grant and the public interest, the bill will be dismissed. The right to interfere is sought to be sustained in a class of cases where one of many commissioners seek to restrain from infringing the property of the county to establish a general *modus*. The analogy, however, does not hold. In those cases, the right to interfere is sought to be sustained on the fact, that each commoner or parish

his individual rights. In another class of cases, where a great number are separately interested in the same subject, one or more, for convenience, and to prevent delay, may litigate the right in chancery, for himself and all others interested; and the court having the subject and the parties operating before it, will so control as to protect the rights of all concerned. The case before us does not, in our opinion, belong to either of these classes.

The present is an attempt, by two or three individuals, to enforce the rights of the county and guard the county property from forfeiture. This court, in *Putnam v. Valentine*, 5 Ohio, 189, has determined that "rights purely public are to be enforced in the name of the state, or the officer intrusted with the conduct of public suits." If the rights of the county of Butler are violated or threatened, redress must be sought in the name of the county or its acknowledged agents: 5 Ves. 29; *Swanst.* 244; 5 Ohio, 189. The case relied upon by the complainants' counsel, in 3 Munf. 358, was brought by Murchie, a surviving trustee of Manchester, to prevent an injury to the common right of inhabitants of the town. There is no pretense in the bill that the complainants have any individual interest in this square, as tenants in common or otherwise, which they ask us to protect. They are mere volunteers to take charge of the public or county interest, without ever having been intrusted by the county with the performance of such duty. They ask to be permitted to act for the public, without offering any reason for taking the business from the public agents. If the court was right, in 5 Ohio, 189, in deciding that a supervisor of highways had no authority to proceed in chancery to restrain from the destruction of a public highway, the right of the complainants is much less apparent. The bill must be dismissed. The leave asked to amend would not avail the complainants, if granted.

The court designedly leaves untouched the right of the commissioners to lease the ground as proposed.

Cited in *Brown v. Manning*, 6 Ohio, 303, in support of the proposition, that where lands are dedicated by the owner to any lawful use, public, pious, or charitable, and are used for the object and in the manner contemplated by the owner, it inures as a grant, and the existence of a grantee is not necessary to the validity of such dedication. At page 305, the principal case is again cited and distinguished from that case. Also cited in *Le Clercq v. Trustees of Gallipolis*, 7 Ohio, 220, to the effect that where land is dedicated to the public, a person not interested can not interfere with the manner of using

GROSVENOR v. S. AND C. AUSTIN

[6 OHIO, 103.]

CREDITOR BEFORE JUDGMENT may sustain a bill against an administrator to compel the distribution of the estate. **PARTNERSHIP CREDITORS** are entitled to be paid in preference to creditors of its individual members. **SEPARATE CREDITORS** of a decedent are not entitled to be paid out of a firm of which he was a member.

BILL in chancery. Seymour and Calvin Austin, partners as merchants, both died insolvent. Their assets. Seymour Austin, however, had individual assets. The complainants, who were creditors of the firm, filed a bill against the administrator of S. Austin to compel the distribution of his individual assets, whereupon his individual assets were paid out to them.

Hitchcock, for the complainants.

Whittlesey and Newton, for the defendants.

By Court, **LANE, J.** The court have heard the case, and in this case, that a bill in chancery may be filed by a creditor, before judgment, to compel the distribution of the estate of a decedent, because such a bill may be filed against a decedent's administrator for such a purpose. An account he reports of the master shows that there are assets of Seymour Austin separately, and of Seymour Austin and Calvin Austin jointly; also, that the estate of Calvin Austin is insolvent.

It is now insisted, on behalf of the separate creditors of Seymour Austin, that as any property of the firm, if found in the hands of the administrator, must be first exclusively applied to the payment of partnership debts, therefore the separate property of Seymour Austin shall be first applied to the discharge of his separate debts, which, in respect to the creditors of the firm, is a preference. In support of this proposition, the following cases are cited: *Gow Part.* 386; *Gray v. Gow*, 6 Serg. & R. 18; 2 Desau. (S. C.) 203; 2 *Whittlesey v. Lambert*, 2 Johns. Ch. 508.

This court are of opinion, that if any case has been of frequent application, and that it is far to the profession. Yet no case is found in the books.

cept the one in 9 Vesey, and the South Carolina case. That touches such a doctrine, unless cases founded on the statutes of bankruptcy. A claim so novel, in a case necessarily of such common occurrence, must be listened to with caution amounting to jealousy. Its unavoidable tendency is to disturb and overthrow the settled policy of our law for the disposition of decedents' assets, which seeks to make equal distribution of them to every creditor.

A creditor of two debtors, not partners, is at liberty to enforce satisfaction from either. If either die, the claim becomes a separate debt, to be satisfied on terms of equality with the decedent's other debts. But if the debtors were partners, holding a joint fund, the creditor is permitted a specific preference to subject that joint fund to the payment of his joint claim or debt; and this, not because the creditor's rights are enlarged by the existence of a joint fund, but because the interests of the partners are so connected with its distribution, that it is necessary to adopt this rule, to secure the rights of the debtors between themselves. Hence the doctrine has been introduced that the partnership property should be first applied in satisfaction of the partnership debts; not for the creditor's sake, but because there is a fund which both parties have reciprocally a right to apply for the benefit of a third party.

But where the question is merely between the creditor and the surviving debtor, and no trust fund exists in which the other debtor or his representative have an interest, the reason does not obtain, and the creditor stands in the relation of any other creditor, to be paid in the same proportion with them. This happens to be the position of the complainants in this case, who make no claim to any such trust fund, for none such exists; but set up against the estate of Seymour Austin a joint and several debt with Calvin Austin. The question does not seem to avail in any case except where there are two funds for distribution and two classes of creditors.

But even if such a case were presented, we should long hesitate before we should introduce an element into our system of jurisprudence, so calculated to render more complex the equal distribution of decedents' estates among creditors. The statute plainly endeavors to make that distribution equal, conformable to the dictates of the soundest equity. We can not resist the persuasion that the distinguished chancellors, in the cases referred to, have unwarily adopted as a general doctrine, one rather applicable to cases under a statute of bankruptcy. We

consider that its introduction here would be consequences, and therefore reject it.

The case is again referred to the master.

Cited upon the following points: That one creditor, in certain circumstances, and for convenience, represent and lia for a large number: *Brown v. Manning*, 6 Ohio, 305. That the jurisdiction to settle the estate of a decedent at the time of his death, before judgment, because it is a trust: *Stiver's Adm'r*, 220. That wherever a partnership exists, the partnership lien upon the partnership property, both as between the partners and the creditors and the partners, or their representatives: *Hampson*, 8 Id. 365. In *Commercial Bank v. Western*, 451, to show that the reason partnership debts are paid out of partnership property, and the separate debts out of their separate estate, is because of the peculiar relation of the partners, as well as from the fact that the law provides that obligations were incurred to increase partnership property, and liabilities enhanced the property of the individual. In *7 Ohio St.* 190, that portion of the principal case in which it was held that separate creditors of an individual partner were not entitled to the payment of their debts out of the separate estate over firm creditors, was held to be *obiter*. In *Banister's Adm'r*, Wright, 732, it was held that the representatives and creditors of a deceased person could not sue for the accounts, and make distribution, citing principal case: *P. F. W. R. Co.*, 4 W. L. G. 379.

PARTNERSHIP PROPERTY, LIABILITY OF.—The liability for the individual debt of a partner was considered in *Halsey*, 8 Am. Dec. 293; and the liability of separate partnership debts in *McCulloh v. Dashiell's Adm'r*, 1 Pennsylvania, and South Carolina, partnership creditors their claims paid out of the partnership property in *White v. Dou*, 21 Id. 370; *Bowden v. Schatzell*, 23 Id. 370. Creditors have no preference over creditors of individual partners: *Reed v. Shepardson*, 19 Id. 262, it was held that partnership debts out of the partnership estate, and separate debts out of the individual partners. In *Wilder v. Keeler*, 23 Id. 370, partnership were held not entitled to prove their claims against the estate of an individual partner, until all the separate debts had been paid.

C. RICHARDSON'S ADM'R v. M. RICHARDSON

[6 OHIO, 125.]

TERMS, BEYOND SEAS, are equivalent to beyond

Van Matre, for the defendant.

Strail and Fales, for the plaintiff.

By Court, WRIGHT, J. It is conceded by the parties in this case, that the statute of limitations of January, 1804, 1 Chase's Ohio Laws, 392, was in force when this action accrued. That act limits the bringing debt upon "specialty under hand and seal," to fifteen years after such cause of action; but it provides, that if any person entitled to such action shall be "beyond sea" at the time such action accrues, he shall have a right to bring his action within the time limited by the act, after such disability shall be removed.

The only question presented on this demurrer is, do the words "beyond sea" in legal acceptation, describe persons without the jurisdiction of the state, though no sea intervene? The supreme court, many years ago on the circuit, and frequently since that time, decided, that persons without the jurisdiction of the state, were "beyond sea," within the meaning of this act. The terms, "beyond sea," are borrowed from the act, 21 James I., which in England have been adjudged to have a meaning synonymous with beyond or out of the realm. Like expressions have been held by the supreme court of the United States to be equivalent to without the limits of the state: 3 Cranch, 174; 3 Wheat, 545; 8 Id. 366. Similar decisions have been made in other states: 1 Har. & McH. 89; 1 Har. & J. 350 [*Pancoast's Lessee v. Addison*, 2 Am. Dec. 520]; 2 McCord, 331 [*Forbes v. Foot*, 13 Am. Dec. 732]; 3 Mass. 271; 1 Pick. 263. With these constructions we are satisfied. The plaintiff, then, being within the exception of the statute, and the disability continuing until he removed into this state in 1823, less than nine years of the statute had run when the suit was brought, and the replication avoids the plea.

Leave was asked and obtained to amend the pleas, on paying all the costs since they were filed.

"BEYOND SEAS."—In *Pancoast v. Addison*, 2 Am. Dec. 520, these words were held to be synonymous with the words "out of the state." So in *Forbes v. Foot*, 13 Id. 732. In the note to the latter case the authorities are collected, showing that in this country "beyond seas" and "out of state" are analogous expressions and have the same meaning.

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3. ASSIGNMENT, TO BE VALID BY THE STATUTE OF NEW JERSEY, must be for the equal benefit of all creditors, and must not create any preference; and an assignment which does not comply with these requirements is, in contemplation of law, fraudulent and void. *Varnum v. Camp*, 476.
4. INSTRUMENT EFFECTUAL, WHERE MADE, to transfer the maker's property there situated, can not have that effect in another state, by whose laws it is declared to be fraudulent and void; hence, an assignment which creates a preference, although valid in New York, where it was made, is ineffectual to transfer property of the assignor, which was, at the time of its execution, situated in New Jersey. *Id.*
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 8. ATTACHMENT OF BULKY ARTICLES, SUCH AS HEWN STONES, lying on a stranger's land, by the officer's going among them and declaring that he attaches them, and leaving a receiptor in charge, without removing them, or giving notice to any one in the vicinity, is sufficient as against a subsequent attachment without notice thereof. *Id.*
 9. NOTORIETY IS UNNECESSARY to an attachment of personalty. *Id.*
 10. CONTINUED ACTUAL POSSESSION IS UNNECESSARY to continue an attachment, and it is sufficient if the officer's custody, varying with the nature and position of the property, is such as to enable him to retain and assert his control over it, so that probably it can not be interfered with without his knowledge. *Id.*
 11. LEAVING HEWN STONES IN CHARGE OF A RECEIPTOR who resides near and in sight of them, is sufficient, without removing them, to preserve an attachment as against a subsequent attachment without notice. *Id.*
 12. RECEIPTOR FOR PROPERTY ATTACHED, by his receipt admits that it was attached as the property of another person; and he is, therefore, in a suit brought to enforce his promise to return such property, precluded from setting up property in himself by way of defense. *Bursley v. Hamilton*, 423.
 13. RELINQUISHMENT BY OFFICER OF HIS RIGHT to the possession of property attached by him, is a good consideration for a promise to return the same, even when the promise is made by the owner of such property. *Id.*
 14. RECEIPTOR MAY, AFTER COMPLYING WITH HIS PROMISE to return the property receipted for, bring replevin, trespass, or trover to try his right of property; and will not, in such action, be estopped by his receipt from proving title in himself. *Id.*
 15. THIRD PERSON WHOSE PROPERTY IS ATTACHED is not bound to sue the officer immediately, but may wait until the property is taken in execution. *Id.*

16. EVIDENCE OF PROPERTY IN THE DEFENDANT is admissible upon the question of damages, in a suit on his promise to return the property; and if such evidence shows that the property could not have been applied to satisfy the creditor's execution, the plaintiff can recover nominal damages only. *Id.*

ATTORNEY AND CLIENT.

1. CONFIDENTIAL COMMUNICATIONS between an attorney and client are not to be revealed in any action or proceeding between others, even after the relation of attorney and client has ceased. *Hutton v. Robinson*, 415.
2. PRIVILEGE IS THAT OF THE CLIENT, and continues until voluntarily waived by him. *Id.*
3. PRIVILEGE EXTENDS ONLY TO COMMUNICATIONS TO AN ATTORNEY or counselor, when applied to and acting as such, and to those whose intervention is strictly necessary to enable the client to communicate with his attorney. *Id.*
4. COMMUNICATIONS MADE TO THE ATTORNEY BY A THIRD PERSON in the presence of the client are not privileged. *Id.*
5. COMMUNICATIONS NOT MADE FOR THE PURPOSE OF OBTAINING THE LEGAL ADVICE or opinion of the attorney, or instructing him in a cause, or engaging him in the conduct of professional business, are not privileged. *Id.*
6. COMMUNICATIONS MADE TO AN ATTORNEY EMPLOYED TO DRAW A MORTGAGE, gratuitously, or merely for the purpose of satisfying the attorney's scruples as to the character of the transaction, and without any view to obtaining his professional advice or opinion, are not privileged. *Id.*

AWARD.

See ARBITRATION AND AWARD.

BAILMENTS.

1. ONE RECEIVING A SEALED LETTER containing money for delivery to another, and failing to deliver, is not liable for money had and received, etc., where there is no evidence of his opening the letter. *Beardslee v. Beardslee*, 596.
2. GRATUITOUS BAILEE is liable only for gross negligence. *Id.*
3. EVIDENCE OF A DEMAND AND REFUSAL is sufficient to throw upon such bailee the burden of showing that the property was lost without his fault or gross negligence. *Id.*

See TRESPASS, 10; TROVER, 2.

BANKRUPTCY AND INSOLVENCY.

See ASSIGNMENTS.

BEYOND SEAS.

See STATUTE OF LIMITATIONS, 18.

BONA FIDE PURCHASER.

1. A BONA FIDE PURCHASER FROM A FRAUDULENT GRANTOR obtains a title which can not be affected by the fraud. *Dugan v. Vattier*, 105.

2. **PAYMENT IN FULL** before receiving notice of an equity, is essential to constitute a *bona fide* purchaser. *Id.*
3. **NOTICE OF PRIOR UNREGISTERED DEED, EFFECT OF CONVEYANCES WITH.**—Where a grantee takes with notice of a prior unregistered deed and conveys to another, who takes with like notice, the latter, as well as the former, is precluded from setting up the subsequent deed against such prior unregistered deed. *Adams v. Cuddy*, 330.
4. **HE IS NOT A BONA FIDE PURCHASER** who merely takes the legal estate in payment of or as security for a previous debt. *Dickerson v. Tillinghast*, 528.
5. **TO CONSTITUTE ONE A BONA FIDE PURCHASER**, he must, before he has notice of a prior equity, either part with his property on the credit of the estate, or give up some security, or part with some right, or place himself in a worse position than he would have occupied had he received the notice before his purchase. *Id.*
6. **ONE WHO TAKES A CONVEYANCE** of an estate in payment of a debt without notice of a prior unrecorded mortgage, is not a subsequent *bona fide* purchaser as against the mortgagee. *Id.*
7. **OWNER OF PROPERTY CAN NOT BE DIVESTED** of it except by his consent, or by operation of law. *Williams v. Merle*, 604.
8. **BONA FIDE PURCHASER FROM ONE WHO HAS NO TITLE** or authority to sell, acquires no title against the true owner. *Id.*
9. **CERTIFICATE OF THE INSPECTOR OF POT AND PEARL ASHES**, under the statute, does not determine the title so as to protect a *bona fide* purchaser. *Id.*

See LIS PENDENS.

BOOKS OF ACCOUNT.

See EVIDENCE, 9, 18, 19, 29.

BOUNDARIES.

BOUNDARY—A PAROL AGREEMENT, by the owners of adjoining lots, that a line run by a surveyor shall be the boundary between them, is, when executed, conclusive upon them and upon those claiming under them. *Sawyer v. Fellows*, 452.

See REAL ESTATE.

BRIDGES.

WHERE A BRIDGE BECOMES DEFECTIVE by the gradual decay of its timbers, and the danger is not open and visible to all, the owners thereof, who continue to keep the same open, and to take toll, are liable, notwithstanding they notified a person who was injured thereby not to try to pass over. *Randall v. Proprietors*, 453.

COLLECTOR OF TAXES.

See TAXATION.

COMMONS.

1. **COMMON, OR A RIGHT OF COMMON**, is a right or privilege which several persons have to the produce of the lands or waters of another. *Van Rensselaer v. Radcliff*, 582.

2. **COMMON APPENDANT** is a right annexed to the possession of arable land, by which the owner is entitled to feed his beasts on the lands of another, usually of the owner of the manor of which the lands entitled to common are a part, and can be claimed by a prescription only. *Id.*
3. **COMMON APPURTENANT** does not necessarily arise from any connection of tenure, but must be claimed by grant or prescription; it may be created by grant, and may be annexed to any kind of land, whether arable or not. *Id.*
4. **COMMON IN GROSS** has no relation to the tenure of lands, but is annexed by deed or prescription to a man's person. *Id.*
5. **COMMON OF ESTOVERS** is the right the tenant has to take necessary wood and timber from the woods of the lord for fencing, fuel, etc., and may be either appendant or appurtenant. *Id.*
6. **COMMON OF ESTOVERS ARE NOT APPORTIONABLE.**—The common belongs to the entire tract as an entirety, and if the owner of such tract conveys to different persons, the common is extinguished, and can not be revived but by a new grant. *Id.*
7. **WHERE A COMMON OF ESTOVERS DESCENDS** upon several, although they can not enjoy it severally, they may convey to one who might enjoy it in severalty as an entirety. *Id.*
8. **THE LORD OF THE MANOR MAY IMPROVE** his waste land, provided he leaves enough for those entitled to common. *Id.*
9. **TO BAR A COMMON**, the improvements by the lord must be actual *bona fide* improvements; a mere possession fence is not sufficient. A stranger, however, can not question the sufficiency of the improvement. *Id.*
10. **WHERE A COMMON IS NOT APPORTIONABLE**, a purchase by the commoner of a part of the land subject to the common extinguishes it. *Id.*

COMMON CARRIERS.

COMMON CARRIER IS RESPONSIBLE FOR ALL LOSSES, except those that are inevitable, or that arise from the act of God or of public enemies, unless he be protected by the terms of his contract. *Daggett v. Shaw*, 439.

COMPOSITION.

1. **A CREDITOR WHO SIGNS A COMPOSITION DEED**, releasing the debtor from all demands, and sets opposite his name an amount representing his debt, can not sue the debtor on a demand accruing prior to the release, and entirely distinct from the debt set forth in the deed. *Russell v. Rogers*, 574.
2. **A CREDITOR WHO ASSUMES TO COMPOUND** for his entire demand, can not subsequently sue the debtor on a claim existing prior to the execution of the composition deed. *Id.*
3. **IDEM.**—Whether the action could be maintained if the creditor was ignorant of the fraud by which the claim was created, *quære*. *Id.*

CONFIDENTIAL COMMUNICATIONS.

See **ATTORNEY AND CLIENT**.

CONFLICT OF LAWS.

See **ASSIGNMENTS**, 4, 5; **DIVORCE**, 3, 4, 5.

CONSIDERATION.

1. NOTE GIVEN FOR A VOID PATENT RIGHT is without consideration and void. *Dickinson v. Hall*, 390.
2. COVENANT BY THE VENDOR THAT HE HAS A GOOD RIGHT TO SELL and convey such patent right, and will warrant the same, furnishes no valid consideration for such a note. *Id.*
3. VENDOR'S BELIEF THAT SUCH RIGHT IS VALUABLE, will not support an action on such note. *Id.*
4. CONSIDERATION FOR SUBSCRIPTION.—When several agree to contribute to a common object which they wish to accomplish, the promise of each is a good consideration for the promises of the others. *Congregational Soc'y v. Perry*, 455.

See CONTRACTS, 1, 2, 3, 4; NEGOTIABLE INSTRUMENTS, 14, 15, 16; PLEADING AND PRACTICE, 2, 3.

CONSTITUTIONAL LAW.

1. THE DECISIONS OF THE SUPREME COURT of the United States determining that the statute of a state violates the Constitution of the United States, must be followed by the state courts. *Linn v. Bank of Ill.*, 71.
2. TO EMIT BILLS OF CREDIT is to issue paper redeemable at some future day, and intended to circulate as money. *Id.*
3. THE CERTIFICATES OF THE STATE BANK OF ILLINOIS were bills of credit and within the prohibition of the Constitution of the United States, although they are not made a legal tender by statute. *Id.*
4. IT IS WITHIN THE PROVINCE OF THE JUDICIARY to declare an act of the legislature void for unconstitutionality. *Hoke v. Henderson*, 677.
5. AN ACT OF THE LEGISLATURE will be declared unconstitutional only, in the case that its repugnance to the constitution be beyond reasonable doubt. *Id.*
6. AN ACT IS UNCONSTITUTIONAL as an assumption of judicial power, if it professes to decide between an existing conflict of right, or if it declare that an existing right of property shall cease. *Id.*
7. SUCH AN ACT WILL NOT BE REDEEMED because others, of the objects sought to be attained, are within the legitimate powers of the legislature. *Id.*
8. AN ACT OF THE LEGISLATURE is not a "law of the land" if its effect, if valid, would be to deprive a citizen of a right of property, or inflict on him punishment without previous trial had before the judicial tribunals. *Id.*
9. THE LEGISLATURE MAY ENACT what laws to them seem meet, upon all subjects wherein not restrained by the constitution. *Id.*

CONTINUANCE.

See PLEADING AND PRACTICE, 44, 45, 46, 48.

CONTRACTS.

1. A PROMISE MADE IN CONSIDERATION of an act forbidden by law, is void. *Linn v. Bank of Illinois*, 71.

2. A NOTE GIVEN in consideration of bills of credit, or loan-office certificates received by the maker, is void. *Snyder v. State Bank*, 1 Broese, 122, overruled. *Id.*
3. COMPETENT PARTIES and sufficient consideration are essential to a valid contract. *Carson v. Clark*, 79.
4. A PROMISE TO PAY FOR IMPROVEMENTS erected on public lands, to which the promisor has acquired title from the government, is without consideration, and void. *Id.*
5. THAT THE OBLIGOR AND OBLIGEE are the same person, is not a legal deduction from the identity of the names. *Allis v. Shadburne*, 121.
6. ACTS OF AN OBLIGEE WHICH SUSPEND his cause of action against a joint obligor, generally release the cause of action as to such obligor; as where he marries the obligor, or where he appoints such obligor his executor. *Id.*
7. RELEASE OF ONE JOINT DEBTOR, is a release of all. *Id.*
8. JOINT BOND EXECUTED BY TWO PERSONS, and made payable to one of such persons, is void as to the latter, and is in effect the sole obligation of the other, against whom the obligee, although named in the bond as a co-obligor, may maintain an action at law to recover the amount thereof. *Id.*
9. EACH OBLIGOR in a joint obligation, is bound, *in solido*, for the whole undertaking. *Id.*
10. TWO PERSONS, WHO JOINTLY OWN A DEBT, and execute a bond for its payment, payable to one of such persons, he who is alone liable at law upon such bond, will be relieved in equity, against the payment of more than his share of the debt to the obligee, who is his co-obligor. *Id.*
11. MONEY PAID TO THE OBLIGEE in a bond by the obligor, there being no proof that the latter is otherwise indebted to the former, will be presumed to have been paid on account of such bond. *Butler v. Triplett*, 136.
12. AN OBLIGATION IN SOLIDO will never be presumed. *Mayor of New Orleans v. Ripley*, 175.
13. THE WORDS "WE PROMISE TO PAY" create a joint obligation. *Id.*
14. WORDS INSERTED IN A WRITTEN CONTRACT, and then erased by drawing lines through them, may be referred to for the purpose of ascertaining the intent of the parties to the contract. *Hobart v. Dodge*, 214.
15. WHERE THERE IS A SPECIAL CONTRACT, the plaintiff can not recover in *indebitatus assumpsit* the contract price, unless there has been a complete performance on his part, nor if by such recovery the terms of the contract would be violated. *Marshall v. Jones*, 260.
16. WHERE ASSUMPSIT IS BROUGHT to recover the value of work performed in pursuance of a special contract, the defendant may introduce such contract in evidence to show that plaintiff has not complied with its terms, or that the defendant is liable to others as well as the plaintiff for the work performed, or that the parties have agreed upon the rule of damages for failure to comply with the terms of the contract. *Id.*

See INFANCY; SPECIFIC PERFORMANCE; USAGE; WAGES.

CORPORATIONS

See AGENCY, 4; ATTACHMENT, 2; ESTOPPEL, 4.

COSTS.

1. **THE ALLOWANCE OR DISALLOWANCE** of costs in suits in chancery is discretionary with the court. *Cowles v. Whitman*, 60.
2. **COMPLAINANT WHO SHOWS HIMSELF ENTITLED** to some relief, although only part of the relief sought, is entitled to recover costs. *Butler v. Triplett*, 136.
3. **TO ENTITLE THE PLAINTIFF** to costs in an action for overflowing his lands, it must be shown that the right to the direct use by entry on another's land came directly in controversy; the statute does not apply to cases of mere consequential injuries from the manner in which one uses his own land. *Chandler v. Duane*, 578.
4. **DEFENDANT IS ENTITLED TO COSTS** where the plaintiff does not recover more than fifty dollars in an action for overflowing his land, although a parol license so to do came in question on the trial. *Id.*

CO-TENANCY.

1. **EJECTMENT, NOT PARTITION**, is the remedy of a tenant in common ousted by his co-tenant. *Thomas v. Garvan*, 708.
2. **AN OUSTER WILL BE PRESUMED** by one co-tenant against the other, from a sole possession held for twenty years or more. *Id.*
3. **EVERY POSSESSION WILL BE CONSTRUED** to be consistent with right, unless it be shown to have been claimed and held otherwise. *Den v. Webb*, 711.
4. **THE SOLE SILENT OCCUPATION** of one tenant in common, without an account to or claim by the others, is not in law an ouster, or evidence of an ouster, unless continued for twenty years. *Id.*

See PARTITION.

COVENANTS IN DEEDS.

1. **AN ACTION FOR BREACH** of a covenant of warranty may be maintained without showing an actual eviction by a paramount title. A yielding up the possession to him who owns such paramount title, or purchasing that title, is sufficient. *Donnell v. Thompson*, 216.
2. **A COVENANT OF WARRANTY RUNS WITH THE LAND**, and inures to the benefit of the assignee of the covenantee, who may bring an action for the breach of it, in his own name, against the original covenantor. *Suydam v. Jones*, 552.
3. **SUCH ASSIGNEE IS NOT AFFECTED** by the equities existing between the original parties. *Id.*
4. **IDEM.**—Therefore, in an action by an assignee of the covenant of warranty against the covenantor, the latter can not set up that the mortgage claimed to be a breach, existed at the time of the original conveyance, and that it was agreed and understood by the covenantor and the covenantee that the mortgage was to be excepted from the covenant, and should be assumed by the covenantee as part of the consideration. *Id.*
5. **A COVENANT UNDER SEAL**, not broken, can not be discharged by a parol agreement. *Id.*
6. **IDEM.**—To make such a defense available, the assignee must be affected with fraud. *Id.*

See VENDOR AND VENDEE.

CRIMINAL LAW.

1. WRIT OF ERROR LIES IN A CAPITAL CASE in Missouri, but a bill of exceptions will not be allowed or considered in such a case. *Mitchell v. State*, 442.
2. PERSON WHO, IN COMMITTING A FELONY, UNDESIGNEDLY KILLS another, is guilty of murder, especially if death was a probable consequence of his act. *State v. Cooper*, 490.
3. NO MAN CAN BE BROUGHT INTO JEOPARDY of his life more than once for the same offense. *Id.*
4. WHEN ONE FELONY BECOMES AN INGREDIENT of a superior one, the defendant can not be convicted of both offenses. *Id.*
5. PRISONER WHO HAS BEEN CONVICTED OF ARSON can not afterwards be tried on an indictment for murder for the commission of the same arson, where the statute imposes the penalties of murder for such arson. *Id.*
6. DEFENDANT CAN NOT BE CONVICTED for two distinct felonies growing out of the same identical act, where one is a necessary ingredient in the other; and if the state prosecutes the lesser offense to a conviction, such conviction will be a bar to an indictment for the higher offense. *Id.*
7. INDICTMENT FOR OBTAINING, BY FALSE PRETENSES, A SIGNATURE to a note, need not allege that any one suffered actual loss or prejudice thereby. *People v. Genung*, 594.

CROPS.

See GROWING CROPS.

DAMAGES.

See ATTACHMENT, 3, 4, 5; TAXATION, 6.

DEEDS.

1. RESERVATION IN A DEED by which the grantor reserves to himself "the right of passing and repassing with teams in the most convenient place across the land conveyed," does not restrict the right of way to a transverse one; it may be both transversely and lengthwise, as may be most convenient to the grantor. *Brown v. Meady*, 248.
 2. WORDS "ACROSS THE LAND CONVEYED," in a reservation in a deed, may mean over the land; they do not necessarily exclude the idea of passing over a parallelogram in a longitudinal direction. *Id.*
- See ACKNOWLEDGMENTS; ALIENS, 1, 2; EVIDENCE, 22; MARRIED WOMEN.

DEPOSITIONS.

DEPOSITIONS TAKEN UPON NOTICE TO SOME, but not all the adverse parties, may be used against those who had notice. *Hanly v. Blackford*, 114.

See EJECTMENT, 2.

DETINUE.

OFFICER SEIZED, IN DETINUE, for a chattel that he has taken and holds under an order of court, must show, by his plea, how he holds it. Under a plea of *non detinet*, evidence of his right to hold, is inadmissible. *Owen v. Olney*, 165.

DIVORCE.

1. ONE SHOWN TO BE GUILTY OF ADULTERY is not estopped from his wife for a like offense previously committed. *Christianberry v. Christianberry*, 96.
2. A PETITION FOR DIVORCE ON THE GROUND OF ADULTERY. *Id.*
3. WHERE A CAUSE OF DIVORCE AROSE IN ONE STATE, and the parties resided at the time, and in which the husband was to reside, but the laws of that state do not authorize the cause, the courts of another state have no jurisdiction on that ground after the wife's removal there, although she was there at the time of their marriage. *Harteau v. Harteau*.
4. WIFE MAY HAVE A SEPARATE DOMICILE from the husband for the purpose of suing for a divorce. *Id.*
5. PLACE WHERE THE MARRIAGE WAS CELEBRATED is immaterial in suits for divorce. *Id.*

DOWER.

RIGHT OF WIDOW FROM PROVISION in her husband's will. *Id.*
right of dower, which is liable neither to dower nor to dower. *Lamb*, 718.

See JUDGMENTS, 1.

EASEMENTS AND SERVITUDES.

1. GRANT OF A THING IMPLIES A RIGHT to all the things which the grantor was possessed. *Hathorn v. Hathorn*.
2. WHERE ONE BEING THE OWNER OF A MILL DAM, and the dam above flowed by such dam, sells the mill with the dam, he can not afterward compel the grantee to pay for the injury caused by such flowing. *Id.*
3. SUCH GRANTEE WOULD HAVE THE RIGHT to compel the grantor to raise the same head of water as the grantor had before the grant. *Id.*
4. WHERE THE OWNER OF LAND TO WHICH AN EASEMENT HAS BEEN GRANTED, the owner of the land upon which the easement is granted is extinguished, and a subsequent sale of the land unburdened with such easement, unless the conveyance. *Id.*
5. LIABILITY OF A PERSON FOR THE FLOWING OF WATER FROM AN ADJOINING TRACT is absolutely extinguished by the title to such adjoining tract, and upon the land conveyed, the right to compensation for such flowing.

See COMMONS; LATERAL SUPPORT.

EJECTMENT.

1. WHERE TENANTS IN POSSESSION, together with their defendants in an action of ejectment, there are such tenants, except upon such evidence as is shown against the warrantor. *Woodard v. Spiller*.

purchase is estopped to deny his vendor's title; but where the land is claimed by a purchaser at an execution sale against the vendor, the vendee in the contract to purchase is not estopped from showing that the title of his vendor was merely equitable, and not subject to sale on execution. *Milton v. Riley*, 149.

2. **DEPENDANT IN EJECTMENT IN POSSESSION** of a tract of land under a contract to purchase, and whose vendor's title has been sold under execution to the plaintiff, will not be permitted to set up an outstanding title paramount to that of his vendor's, for the purpose of defeating the plaintiff's action. *Id.*
 4. **GIVING A NOTE TO A CORPORATION** estops the maker to deny its corporate existence. *Congregational Society v. Perry*, 455.
- See ATTACHMENT, 12, 14.

EVIDENCE.

1. **WHERE THE ADMISIONS OF A PARTY** are used against him, the whole must be taken together; if part of a statement be admitted, the whole must be admitted, whether explanatory of the part or not. *Clark v. Smith*, 47.
2. **DECLARATIONS OF GRANTEE**, under whom the plaintiff in ejectment claims, made in the presence of the plaintiff, that the deed was not an absolute conveyance, but made as security merely, are not admissible, the grantee himself being present and a competent witness. *Chapin v. Pease*, 56.
2. **TESTIMONY OF PARTY** to a suit, given voluntarily and against his interest, is admissible. *Cowles v. Whitman*, 60.
4. **A TRANSCRIPT FROM A DISTRICT COURT** of the United States is sufficiently authenticated when it is under the seal of the court and is certified by the clerk to be a "full, true, and complete copy of the record." *Adams v. Lisher*, 102.
5. **PROOF OF AN AFFIRMATIVE** must be made by him who alleges it, unless the presumption of law is in favor of the affirmative, as when the issue involves a charge of culpable omission, in which case the party making the charge must prove it, although it involves a negative. *Towsey v. Shook*, 108.
6. **REGISTER OF BIRTHS**, in the handwriting of a deceased father, is admissible to prove the ages of the children. *Woodard v. Spiller*, 139.
7. **COMPARISON OF HANDWRITING** is, in general, not evidence to prove a signature, except where the writing is too old for a living witness to prove it, or in corroboration of other proof. *Id.*
8. **INDIVIDUAL AND EXTRAJUDICIAL KNOWLEDGE** can not be resorted to by the court to supplement the record. *Mayor of New Orleans v. Ripley*, 175.
9. **THE PLAINTIFF'S BOOKS OF ACCOUNT** can not be used to refresh the memory of a witness unless the entries used for that purpose were made by the witness. *Pargond v. Guice*, 202.
10. **PAROL EVIDENCE IS INADMISSIBLE IN A SUIT** in equity to reform a written contract, to show that a mistake exists therein, and that the contract, by the terms of which it appears that the vendor agreed to convey to the vendee "a lot of land situated in Windham," was intended to convey

the whole of a particular lot, part of which was situated in another town. *Elder v. Elder*, 205.

11. ANY FACT OR CIRCUMSTANCE PERTINENT AND MATERIAL to the issue, and tending to prove or disprove it, if offered to be proved by competent testimony, is admissible. *Davis v. Calvert*, 282.
12. WHERE THE COURT DOES NOT CLEARLY SEE that a fact is entirely foreign to the issue, and can not be connected with it by evidence of other facts, it is the practice to admit proof of it upon the assurance of the counsel offering it, that it will turn out to be pertinent and material. *Id.*
13. DECLARATIONS OF A SOLE EXECUTOR and contingent devisee, representing every interest under the will, and being a party on record, such declaration being adverse to the will, and bearing upon the issues raised upon a caveat against the probate of it, are admissible in evidence. *Id.*
14. ADMISSION OF A PARTY ON RECORD is always admissible evidence, with certain exceptions, though he be but a trustee for another. *Id.*
15. STATEMENT BY COUNSEL of what they expect to prove, in reply to a statement on the other side, is not a sufficient foundation for the introduction of adverse evidence, otherwise admissible. *Id.*
16. FACTS NOT PUT IN ISSUE, but tending to prove the issue, are admissible in evidence. *Id.*
17. EVIDENCE DRAWN OUT BY LEADING INTERROGATORIES will not be rejected where the same evidence is elicited by other interrogatories not objectionable on that ground. *Birely v. Staley*, 303.
18. BOOKS OF ABSCONDED MESSENGER OF BANK, WHEN ADMISSIBLE IN EVIDENCE.—Where the messenger of a bank has absconded, and can not, after due diligence, be found within the jurisdiction of the court, a memorandum in a book kept by him, showing that notice of dishonor of a note was given to the indorser, is admissible in evidence. *North Bank v. Abbot*, 334.
19. PAROL EVIDENCE OF CASHIER OF THE BANK is admissible in such a case to explain such memorandum. *Id.*
20. IT IS FOR THE JURY TO DETERMINE, on such evidence, whether notice was actually given or not. *Id.*
21. REGISTRY COPY OF DEED IS GOOD EVIDENCE, *prima facie*, and dispenses with production of the original, except where a grantee relies on the immediate deed to himself, or where, from the nature of the conveyance, the deed is presumed to be in his own custody or power. *Scanlan v. Wright*, 344.
22. PAROL EVIDENCE, WHEN ADMISSIBLE TO EXPLAIN DEED.—Where a grant was made to a married woman in her maiden name, parol evidence is admissible to show that the grantee was the person to whom the grant was made; that she was at the time of the grant known to the grantor by her maiden name; that there was no other person claiming to bear the name used in the deed, or claiming title under it. *Id.*
23. RECEIPT MAY BE CONTROLLED BY PAROL EVIDENCE that it was given by mistake, or that a less sum was paid. *Bridge v. Gray*, 353.
24. ON AN INDICTMENT FOR ADULTERY, evidence of previous improper familiarity between the parties is admissible to corroborate a witness

- who has testified to a specific act of adultery has been impeached. *Commonwealth v. ...*
25. INHABITANTS OF TOWNS are competent while they reside, without a release. *Congregational ...*
 26. JUDICIAL NOTICE OF LAWS OF A SISTER common law, can not be taken. *Holmes v. ...*
 27. DECLARATIONS OF A PARTY to settlement before rights of third parties attach, are admissible to show the transfer thereof between the plaintiff. *Kinball v. Huntington*
 28. EVIDENCE OF AN OFFER BY THE PROSECUTOR testifying in a criminal cause, if the prisoner is able to contradict or impeach his testimony.
 29. PRISONER'S BOOKS, without other testimony in behalf to show the state of the account or charged to have obtained, by false pretenses was due. *Id.*
- See AGENCY, 2; ATTACHMENT, 16; ATTORNEY EJECTMENT, 2, 3; FRAUD, 1, 3, 5; RES ASSUMPTIO, 2; WILLS, 15, 16; WITNESSES.

EXECUTIONS.

1. A PURCHASER AT SHERIFF'S SALE of land to which a lien is attached, even in the absence of fraud, recovers the amount paid to the sheriff. *Muir v. Craig*
2. LIEN OF AN EXECUTION ATTACHES to the defendant's property upon the writs coming into the hands of the sheriff.
3. SALE OF PROPERTY LEVIED ON under execution creates a lien of the writ attached, and conveys the property from that date. *Id.*
4. LAND WHICH THE DEFENDANT in execution has exempt from the lien of the writ. *Id.*
5. PLAINTIFF IN A JUDGMENT IN DETINUE may have an execution in aid of the judgment (Session Acts, p. 159), have an execution in aid of the thing recovered. *Keith v. Johnson*, 167.
6. TENDER OF THE ALTERNATE VALUE will not satisfy the judgment unless the plaintiff elects to take it, or the defendant's fault it is beyond his power to do so. *Id.*
7. SHERIFF MUST, IF NECESSARY TO ENFORCE such a judgment, enter into the defendant's dwelling to seize the slave or thing recovered, if it is concealed therein. *Id.*
8. OFFICER AT THE COMMON LAW has no authority to enter a house to execute a *ca. sa.* or *fi. fa.*, but he requires him to take possession of a particular thing of seisin, *hab. fa. replevin*, *ca. utlagatum*, &c.
9. SHERIFF MAY BREAK INTO ONE MAN'S HOUSE to seize a thing if it is concealed therein. *Id.*

10. OFFICER HAD NO AUTHORITY at the common law to forcibly enter into the dwelling-house of the defendant, for the purpose of executing process issued upon a judgment in an action of detinue. *Id.*
11. MILL-SAW IS NOT A TOOL within the meaning of Stat. 1821, c. 95, and is not, therefore, exempt from execution. *Batchelder v. Shapleigh*, 213.
12. MORE TAKING OF PROPERTY UNDER A *FI. FA.* is not a satisfaction, and the plaintiff may, without impairing his right, countermand the *vend. ex.*, and restore the property at the debtor's instance, and for his accommodation, without payment. *Sascer v. Walker*, 272.
13. ON SIMULTANEOUS ATTACHMENTS of the same land by different creditors and executions thereunder, they take in moieties without regard to the amount of their respective executions. *Sigourney v. Eaton*, 414.
14. WHERE THE PROPERTY ATTACHED IS AN EQUITY OF REDEMPTION, the same principle applies. *Id.*
15. WHERE ONE EXECUTION IS FOR LESS THAN A MOIETY of such property, the surplus is applied to the other. *Id.*
16. SHERIFF HAS THE RIGHT TO PAY TO A PARTY, out of court, money raised by him on execution, but he may discharge himself from liability to the execution creditor, by paying the money into court; and where there are conflicting claims to such money, the latter course is the safer one for him to pursue. *Stebbins v. Walker*, 499.
17. COURT MAY, IN A PROPER CASE, COMPEL THE SHERIFF to bring such money into court, and when brought in, either voluntarily or by order of court, may determine conflicting claims thereto. *Id.*
18. SUMMARY AID OF THIS COURT can not be successfully invoked by a party who stands by and permits the sheriff, acting in good faith, to pay money by mistake to an execution creditor who is not entitled to it; such party will be left to his legal remedy. *Id.*
19. SURPLUS MONEY IN HANDS OF SHERIFF, POWER OF COURT TO CONTROL.— This court has control over surplus money arising on a sheriff's sale, if the property, at the time of the sale, was subject to or bound by subsequent judgments and executions. *Id.*
20. SECOND EXECUTION ACTUALLY LEVIED is an equitable lien on the surplus money remaining after payment of a prior execution out of money raised by the sale, and the court can and will protect this equitable right of its suitor, and order such money to be brought into court and applied to the satisfaction of the execution next in priority. *Id.*
21. IN A PURSUIT TO RETAKE A DEFENDANT, an officer may break open an outer door of a dwelling, after making known his business, demanding admission, and being refused. *Allen v. Martin*, 564.
22. DEMAND FOR ADMISSION IS UNNECESSARY where the officer, having once gained admission, has been thrust out of the house. *Id.*
23. A SHERIFF IS A TRESPASSER who levies upon goods and chattels which are not the property of the defendant in the execution. *Allen v. Crary*, 566.
24. DEBT LIES AGAINST A CONSTABLE for neglecting to return an execution, without showing that he has collected money thereunder. *Sloan v. Case*, 569.
25. CLOTH FROM THE WOOL OF TEN SHEEP IS EXEMPT from execution, against a householder who does not own any sheep. *Hall v. Penney*, 601.

26. SHERIFF'S DEED BEFORE THE TIME FOR REDEMPTION is void on its face. *Per Seward, Senator. Pe*

EXECUTOR AND ADMINIST

1. EXECUTOR MAY SUE IN HIS REPRESENTATIVE money, if recovered, would be assets in his 272.
2. EXECUTORS MAY SUE AS SUCH ON AN APPEAL executors, on appeal from a judgment recoverer, because the money, if recovered, would
3. TRUSTEES APPOINTED IN THIS COUNTRY BY with the same powers with respect to his pr been named executors, and with directions property to the executors appointed in Irel bound to execute their trust in the mode pres v. *Bryson*, 313.
4. WHERE ONLY ONE OF THE PERSONS SO APPO he must execute it as provided by the will.
5. DIFFERENT EXECUTORS MAY BE APPOINTED : where the testator has effects, or as to differ same country. *Id.*
6. EXECUTOR IN THIS COUNTRY MAY BE COMPEL hands to the executor of the testator's domi tions of the will, and it is wholly immate mentary, or of administration *cum testamento* or not. *Id.*
7. FOREIGN TESTATOR'S APPOINTMENT OF TRUS such, without taking out letters testamenta nullity as to his personal estate here, bein testamentary system. *Id.*
8. SUCH A TRUSTEE HAVING TAKEN OUT LETTI bound *ex officio* to the execution of every d upon him as trustee, and can not discharge a payment to himself as trustee. *Id.*
9. DEED OF ADMINISTRATOR CONVEYS ONLY SUC had. *Adams v. Cuddy*, 330.
10. ADMINISTRATOR OF INTESTATE ESTATE AP REALTY must give notice of such applicatio the license conveys no title. *French v. Hoy*
11. SUCH NOTICE IS NECESSARY, notwithstanding mother of the minor heirs for whom no gu and notwithstanding the insolvency of the e
12. EXECUTOR IS ENTITLED TO RETAIN TESTAT necessary for the support of stock during th of the testator and the probate of the will.

See JUDGMENTS, 7.

EXEMPTIONS.

See EXECUTIONS, 11,

FALSE IMPRISONMENT.

See ARREST.

FALSE PRETENSES.

See CRIMINAL LAW, 7.

FEMES-COVERT.

See MARRIED WOMEN.

FISHERY.

See WATER-COURSES.

FIXTURES.

1. **FIXTURES**—MILL ERECTED BY TWO PERSONS upon the land and mill privilege of a third, with his permission, for the purpose of trade and manufacture, does not become a part of the freehold, but remains the personal property of the persons who built it. *Russell v. Richards*, 254.
2. WHERE A. AND B. ERECTED A MILL upon the land and mill privilege of C., with his permission, and subsequently the mill was sold as the personal property of the former, the latter being present at the sale, and declaring that he had no claim or title thereto, he can not thereafter, by a deed of the mill and land, convey the former, although his grantees have no notice of its sale as the personal property of A. and B. *Id.*

FRAUD.

1. THE ONUS PROBANDI OF ESTABLISHING FRAUD OR FAILURE OF CONSIDERATION, as a defense to a note, rests on the defendant. *Towsey v. Shock*, 108.
2. FRAUD IN THE SALE OF AN ALLEGED PATENT RIGHT must be proved by the party relying upon it. *Id.*
3. FRAUD IS NOT TO BE PRESUMED, but positive and direct proof of it is unnecessary. *Davis v. Calvert*, 282.
4. WHERE FRAUD IS THE QUESTION, ANY FACT, HOWEVER SLIGHT, relevant to, and bearing upon the point at issue, is admissible; but the circumstances, when combined, should be so strong as to satisfy the jury of the fact sought to be proved. *Id.*
5. REMOTE, COLLATERAL, AND IRRELEVANT FACTS and circumstances are inadmissible in evidence. *Id.*

See MORTGAGES, 1, 2.

FRAUDULENT CONVEYANCES.

1. CONVEYANCE INTENDED TO DEFAUD CREDITORS is fraudulent and void as to them, but valid as between the parties, and neither at law nor in equity can the grantee be compelled to reconvey. *Chapin v. Pease*, 56.
2. RECONVEYANCE BY A FRAUDULENT GRANTOR to his grantor, such reconveyance being voluntary, and made while the party is in failing circumstances, is void as to his creditors. *Id.*
3. A CREDITOR OF A FRAUDULENT GRANTOR is not estopped to show that the deed under which the grantor held was not given as security merely,

but was given to defraud creditors, and was therefore binding as between the parties. *Id.*

4. PURCHASER FROM THE GRANTEE IN A CONVEYANCE IN FRAUD of creditors will be affected by the fraud, as to every act done to perfect title after notice of such fraud. *Parks v. Jackson*, 656.

FRAUDULENT REPRESENTATIONS.

1. TO RENDER ONE LIABLE FOR FALSE REPRESENTATIONS as to another's solvency, it is necessary to prove that he knew of the insolvency, and that he made the representation with intent to deceive. *Fooks v. Waples*, 64.
2. LIABILITY FOR RECOMMENDING THE CREDIT OF ANOTHER arises only where the recommendation was false and fraudulent. *Lord v. Colley*, 445.
3. A RECOMMENDATION IS NOT TO BE PRESUMED FRAUDULENT because it happens not to be true. The fraud is a question for the jury. *Id.*

GENERAL AVERAGE.

1. PRINCIPLE OF GENERAL AVERAGE will not be applied unless there has been a necessary and voluntary sacrifice of the property of one for the benefit of all concerned in the voyage, and the property which is to contribute was thereby saved from the impending peril. *Scudder v. Bradford*, 355.
2. PROPERTY SAVED MUST CONTRIBUTE, THOUGH AFTERWARDS LOST by another peril in the course of the voyage. *Id.*
3. WHERE THE IMPENDING PERIL WAS MERELY DELAYED, but not averted by the sacrifice, there is no case for general average. Thus, where, by cutting away the masts, a vessel which was dragging her anchors was prevented from drifting on the rocks for an hour, but then drifted again and was lost, but part of the cargo was saved, the part so saved was held not liable in general average. *Id.*

GIFTS.

VALID DONATIO MORTIS CAUSA CAN NOT BE MADE OF THE DONOR'S NOTE payable to the donee. *Parish v. Stone*, 378.

GRANTS.

1. GRANTS OF INCORPOREAL HEREDITAMENTS are presumed after a lapse of twenty years. *Million v. Riley*, 149.
2. GRANT OF A FEE-SIMPLE ESTATE is never presumed from mere length of possession, without other circumstances to aid the presumption, unless such possession has continued for thirty years. *Id.*

See EASEMENTS AND SERVITUDES.

GROWING CROPS.

CROPS GROWING ON LAND AT TIME OF TESTATOR'S DEATH go to the executor as against the heir, but as between the executor and the devisee, the latter is entitled to them. *Smith v. Barham*, 721.

See STATUTE OF FRAUDS, 2.

GUARDIAN AND WARD.

1. THE MOTHER, AS GUARDIAN BY NATURE, OR FOR NURTURE, has no control over the estate of the child, nor is she under any responsibility for the due care of it. *French v. Hoyt*, 464.
2. GUARDIAN OF AN INSANE PERSON IS NOT CHARGEABLE as trustee, at suit of creditors of the ward, until there has been an accounting and a balance found in the guardian's hands. *Davis v. Drew*, 467.
3. A FATHER MAY BE COMPELLED TO ACCOUNT AS GUARDIAN of an infant child, of whose property he has enjoyed the benefit. *Van Epps v. Van Deusen*, 516.
4. A MERE STRANGER OR WRONG-DOER, who takes possession of an infant's property, may in equity be considered as the guardian of the infant, and liable to account as such. *Id.*

HANDWRITING.

See EVIDENCE, 7.

HIGHWAYS.

PUBLIC SQUARES.—Private individuals can not sustain a bill in chancery against the county officers, to enjoin them from making a use of a public square, which it is alleged would result in a forfeiture of the property and an injury to the complainants. *Smith v. Heuston*, 741.

See BRIDGES; STREETS.

HOMICIDE.

See CRIMINAL LAW, 2.

HUSBAND AND WIFE.

See ASSIGNMENTS, 6, 7, 8.

IMPROVEMENTS.

See MORTGAGES, 14, 15, 16, 17.

INDICTMENTS.

See CRIMINAL LAW, 7; LARCENY, 5.

INFANCY.

1. A NEW PROMISE MADE AFTER AN INFANT'S MAJORITY, but after the action has been commenced, will not support the action. *Merriss v. Wilkins*, 472.
2. INFANT HAVING ACCEPTED A NOTE on a third person for labor performed, can not recover for the value of such labor without showing a disaffirmance of the contract by returning the note. *Delano v. Blake*, 617.
3. KEEPING SUCH NOTE EIGHT MONTHS after coming of age, and not offering to return it until the maker has become insolvent, is, in legal judgment, an affirmance of the contract. *Id.*

See GUARDIAN AND WARD; MARRIED WOMEN, 5.

INJUNCTIONS.

AN INJUNCTION WILL NOT LIE to restrain one from making reasonable improvements on his own land, with reasonable care and skill, on the ground of damage to complainant's edifice, if the latter is not entitled to special protection, either by prescription or by grant from the one making the improvement. *Lasala v. Holbrook*, 524.

INSANITY.

See GUARDIAN AND WARD.

INSOLVENCY.

See ASSIGNMENTS.

INSURANCE—MARINE.

1. POLICY OF INSURANCE ON CARGO OF VESSEL IS NOT AVOIDED by the non-compliance of her owners with a statute of the United States requiring all vessels bound on a voyage across the Atlantic to have on board, secured under deck, a certain quantity of water, and imposing a penalty on the master or owner in case the crew or passengers are put on short allowance through failure to comply with its requirements. *Warren v. Manufacturers' Ins. Co.*, 341.
2. SUCH NON-COMPLIANCE DOES NOT OF ITSELF render the voyage illegal, or the vessel unseaworthy. *Id.*
3. WHERE AN INSURED VESSEL HAS BEEN REPAIRED, after a partial loss, the insurer is liable only for the balance of the expense thereof, after deducting the value of old materials not used, and one third of the residue, new for old. *Eager v. Atlas Ins. Co.*, 363.
4. CONTRACT OF INSURANCE IS ONE OF INDEMNITY, and nothing more. *Id.*

See ATTACHMENT, 1; USAGE, 3, 4.

JEOPARDY.

See CRIMINAL LAW, 3, 4, 5, 6.

JOINT OBLIGATIONS.

See CONTRACTS.

JUDGMENTS.

1. WIDOW'S JUDGMENT FOR DOWER can not be impeached by her declarations. *Donnell v. Thompson*, 216.
2. SCIRE FACIAS IS NOT PROPERLY THE COMMENCEMENT of a new action, but the continuation of an action already commenced, whenever it is used to carry into effect a former judgment against a party to it. *Adams v. Roe*, 286.
3. SCIRE FACIAS AGAINST BAIL IS THE COMMENCEMENT of a new action, because it issues against a person who was no party to the record in the original action. *Id.*
4. SCIRE FACIAS AGAINST ONE WHO HAS BEEN CHARGED AS A TRUSTEE in a process of foreign attachment, is not the beginning of a new, but the continuation of the original action. *Id.*

5. WHERE THE DEFENDANT IN AN ACTION was personally served and suffered default, being at the time subject to the jurisdiction of the court, and subsequently a writ of *scire facias* was issued to give effect to such judgment, and served upon him, by leaving it at his last place of abode, he having in the mean time removed out of the jurisdiction of the court, such service is sufficient to give the court jurisdiction of the defendant in such *scire facias* proceeding. *Id.*
 6. A JUDGMENT RENDERED IN SUCH PROCEEDING is not open to examination in the courts of the state to which the defendant has removed, when it is attempted to be enforced against him by suit in those courts. *Id.*
 7. JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR DOES NOT BIND REAL ASSETS, and is not even *prima facie* evidence of a debt, where the decedent's realty has been sold for the payment of all his debts. *Birely v. Staley*, 303.
 8. JUDGMENT CAN NOT BE OBTAINED AGAINST HEIRS HAVING NO ASSETS by descent, for a debt of the ancestor. *Id.*
 9. JUDGMENT OF A SISTER STATE properly authenticated stands upon the same footing as a domestic judgment, and if conclusive in that state, is equally conclusive in Pennsylvania, and if re-examinable there, is re-examinable here. *Wernwag v. Pawling*, 317.
 10. JURISDICTION OF THE TRIBUNAL PRONOUNCING SUCH JUDGMENT, may be inquired into under proper pleadings. *Id.*
 11. AWARD OF ARBITRATORS UNDER THE PENNSYLVANIA STATUTE of 1810, after being returned to the office of the prothonotary of the court of common pleas, and after an entry of "judgment nisi" thereon, is as conclusive as any other judgment of that court, if the provisions of that statute, which confer jurisdiction upon the arbitrators, have been complied with. *Id.*
 12. IF THE RECORD SHOWS THAT THE PARTIES AGREED UPON THE ARBITRATORS, and that both parties were present when the time was fixed for the meeting of the arbitrators, the requirements of the statute as to residence of arbitrators, and notice, etc., need not be shown to have been obeyed. *Id.*
 13. VARIANCE IN AMOUNT BETWEEN SUCH JUDGMENT AND THE EXECUTION which appears to have been issued thereon, is no objection to the admissibility of the record of the judgment in an action on it in this state. *Id.*
 14. JUDGMENT OF A JUSTICE CAN NOT BE IMPEACHED COLLATERALLY, in an action brought by the judgment debtor against the officer serving the execution. *Allen v. Martin*, 564.
 15. NEGLIGENCE OF THE COMPLAINANT in preparing or conducting his defense at law, precludes him from obtaining relief in equity from the judgment entered against him. *Green v. Dodge*, 736.
 16. JUDGMENT WILL NOT BE RELIEVED AGAINST because the complainant incorrectly stated his case, or made a false admission in the former action. *Id.*
- See EQUITY, 1, 2, 3, 4; PLEADING AND PRACTICE, 25, 26; RES JUDICATA.

JURISDICTION.

A PROMISE TO PAY A FIXED DEBT "IN TRADE" does not sound in damages, and is within the jurisdiction of a single magistrate. *Cooper v. Chambers*, 710.

LANDLORD AND TENANT.

1. **RELATION OF LANDLORD AND TENANT** is destroyed by a judgment of eviction against the tenant. *Gore v. Stevens*, 141.
2. **TENANT AGAINST WHOM SUCH JUDGMENT HAS BEEN OBTAINED** may, without being actually evicted by *hab. fa.*, purchase any other title for his own benefit. *Id.*
3. **RENT PAYABLE IN ADVANCE ON A CERTAIN DAY** may be paid at any time during that day, and if the tenant is, on that day, evicted under a title paramount, he is not bound to pay such rent. *Harvey v. Tobey*, 430.
4. **EVICITION OF TENANT BY PARAMOUNT TITLE IS A GOOD DEFENSE** in an action of covenant for rent. *Id.*

LARCENY.

1. **RECEIVERS OF STOLEN GOODS**, knowing them to be such, are punishable in Connecticut, the same as a principal. *State v. Weston*, 46.
2. **POSSESSION OF STOLEN GOODS** is *prima facie* evidence that the possessor is the thief and throws on him the necessity of accounting for his possession. *Id.*
3. **THE FINDER OF PERSONAL PROPERTY** on the highway, who knows, or has the means of knowing, the owner, and converts it to his own use, is a thief. *Id.*
4. **A MAN MAY BE GUILTY OF LARCENY IN STEALING HIS OWN PROPERTY** when done with an intent to charge another with its value. *Palmer v. People*, 551.
5. **INDICTMENT FOR LARCENY OF GOODS FROM A CONSTABLE** may lay the property in the officer. *Id.*
6. **A STAGE DRIVER** is a servant within the meaning of the act punishing, as felonious stealing, the embezzlement of property received by virtue of employment as a servant. *People v. Sherman*, 563.

LATERAL SUPPORT.

1. **RIGHT OF LATERAL SUPPORT.**—The owner of land has a natural right to the use of it, in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. *Lasala v. Holbrook*, 524.
2. **IDEM.**—But one has a right to dig upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to adjacent lots in their natural state; and this right can not be taken away by the erection of buildings on neighboring soil whose weight causes the earth to fall into the excavation. *Id.*
3. **ONE WHO IS ABOUT TO ENDANGER HIS NEIGHBOR'S BUILDING**, by making excavations on his land, is bound to give the owner of the adjacent soil proper notice of the intended improvement, and to use ordinary skill in conducting the same; and it is the duty of the latter to prop up his own building so as to render it secure in the mean time. *Id.*
4. **CERTAIN BUILDINGS ARE ENTITLED TO FULL PROTECTION** against the consequences of any new excavation; these are ancient buildings, or those erected upon ancient foundations, by reason of prescription, and those which were granted by the owner of the adjacent lot, or by those under whom they claim. *Id.*

LAW OF THE LAND.

See CONSTITUTIONAL LAW, 8.

LEGACIES AND LEGATEES.

1. PERSON CAN NOT CLAIM AN INTEREST under a deed or will, without giving effect to all its provisions as far as possible. *Gore v. Stevens*, 141.
2. DEVISEE, THE LAND OF WHOM the testator has attempted to devise to another, can not claim the devise to himself without surrendering the title to his land to such other devisee. *Id.*
3. A DEVISEE WHO CLAIMS PROPERTY that has been devised to another, by a title adverse to the testator, and who accepts other property devised to him by the same testator, will be considered as having elected to claim under the will and compelled to surrender his adverse claim to such other devisee. *Id.*
4. PROPERTY DEVISED OR BEQUEATHED TO A PERSON who is dead when the will is made, or who dies before the testator, does not pass to such person's heirs. If personalty, it goes to the residuary legatee, and if real estate, it descends to the heirs of the testator. *Id.*
5. WHERE A TESTATOR CHARGES THE PAYMENT OF HIS DEBTS upon his legatees equally, neither can sue to recover a debt against the estate without first relinquishing all benefit which he or she is entitled to under the will, or bringing the other legatees before the court as parties. *Van Epps v. Van Deusen*, 516.
6. LEGACY "TO BE RAISED OUT OF MY ESTATE" is chargeable upon lands devised by the will, especially where the personalty, which is inconsiderable, is given to the wife, who is appointed executrix during her life. *Bray v. Lamb*, 718.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LICENSE.

1. WHETHER A LICENSE CAN BE PRESUMED from the flowing of lands for the support of mills, no matter for how long such flowing may have continued, *quære*. *Hathorn v. Stinson*, 228.
2. A LICENSE which in its nature amounts to an interest in land, must be in writing. *Putney v. Day*, 470.
3. PAROL LICENSE EXECUTED can not be revoked. *Id.*
4. PAROL LICENSE TO BE EXERCISED UPON LAND, and granted upon a good consideration, is valid, and can not be revoked. *Id.*
5. LICENSE WITHOUT CONSIDERATION may be revoked. *Id.*
6. PAROL LICENSE TO TAKE TREES from one's land as long as the licensee chooses, is revoked by the death of a licensor. *Id.*
7. A LICENSEE IS NOT ENTITLED TO NOTICE TO QUIT. *Doe v. Baker*, 706.
8. EJECTMENT CAN BE MAINTAINED AGAINST A LICENSEE only after demand made upon him for the possession, or after acts done by him of such character as to make him a wrong-doer. *Id.*

LIENS.

1. WHERE A DECEDENT'S LAND, not susceptible of partition, is sold, under the statute of 1820, to one of the heirs, who gives his bond to the state

for the purchase money, such bond is a specific lien on the land enforceable in equity in favor of those entitled to share in the money. *Ridgely v. Iglehart*, 322.

2. AFTER A SALE OF THE LAND on a judgment on the bond by another heir, a third heir may sue in equity to enforce the lien for his share, instead of suing on the bond. *Id.*
3. STATE IS NOT A NECESSARY PARTY to such a suit. *Id.*
4. ALL THE HEIRS MUST BE MADE PARTIES to the suit, as well as the purchaser under the judgment. *Id.*

See EXECUTIONS, 2, 3, 4.

LIS PENDENS.

1. DEED OR BILL OF SALE to a purchaser *pendente lite*, is voidable, not void. *Cromwell v. Clay*, 165.
2. PURCHASER OF A SLAVE during the pendency of a suit to subject it to the vendor's debts, takes the title dependent upon the result of the suit. If the suit fails, the title remains good, and if it succeeds, the purchaser's title fails, but he is entitled to the surplus for which the slave sells, above the amount of the decree. *Id.*
3. PURCHASER OF A CHATTEL *pendente lite*, may recover it from his vendor, but not from an officer who holds possession under an order of court. *Id.*
4. THE PENDENCY OF AN ATTACHMENT SUIT without the jurisdiction, is reason that judgment upon the same cause of action here should be conditional, so that its execution may be stayed, unless the plaintiff dismiss the attachment suit, or if he elect to proceed in that suit, so that only the balance due on the judgment, after the sale of the attachment property, may be collected here. *West v. McConnell*, 191.
5. THE PENDENCY OF A SUIT IN ANOTHER STATE is not matter of abatement to a suit here upon the same cause of action. *Id.*
6. RULE OF LIS PENDENS IS NOT AN ARBITRARY ONE, and should not be applied where the reasons for its original adoption do not exist. *Parks v. Jackson*, 656.
7. RULE OF LIS PENDENS DOES NOT APPLY to strangers whose rights existed before the suit was commenced. *Id.*
8. RULE DOES NOT APPLY TO A PURCHASER in possession, in accordance with a previous *bona fide* contract providing for payment in installments, who has made valuable improvements, and who pays the purchase money and receives a deed after a suit commenced by a creditor of a prior owner, to set aside the conveyance to his grantor as fraudulent. *Id.*
9. SUCH PURCHASER IN POSSESSION should be made a party to the suit; otherwise, if he be not actually notified of the fraud in his vendor's title before paying the purchase money and taking his deed, he will not be affected by the decree setting aside the conveyance to his grantor. *Id.*

LOST ARTICLES.

1. THE FINDER OF LOST PROPERTY ACQUIRES a right, upon return of the property to its owner, to any reward that may have been offered by the owner for a return. *Deslondes v. Wilson*, 187.

2. **THE REWARD MUST BE RATABLY APPORTIONED**, in case part only of the lost property is found and returned. *Id.*

See LARCENY, 3.

MALICIOUS PROSECUTION.

1. **IN AN ACTION FOR MALICIOUS PROSECUTION** the plaintiff can not recover if he was in fact guilty of the crime for which he was prosecuted, although the defendant did not know of such guilt when he instituted the prosecution. *Adams v. Lisher*, 102.
2. **GOOD CAUSE FOR A PROSECUTION** exempts the prosecutor from liability, though his motives were malicious. *Id.*

MARRIED WOMEN.

1. **A MARRIED WOMAN CAN ONLY CONVEY** an estate in lands belonging to her, by joining in a deed with her husband, and by the use of proper terms of conveyance to effectuate the object in view. *Payne v. Parker*, 221.
2. **SIGNING AND SEALING A DEED** is insufficient to convey her estate, unless she is named in the deed as a party to the conveyance. *Id.*
3. **CONVEYANCE BY A HUSBAND** of a freehold estate, of which he is seised in the right of his wife, operates by way of estoppel to convey to the grantee the title during his life. *Id.*
4. **DEED BY A HUSBAND OF AN ESTATE** of which he is seised in the right of his wife, by which he conveys all the right, title, and interest of his wife, Eliza, therein, "except the right to her mother's thirds, which I reserve a right to claim at the decease of the mother of said Eliza," was held to except the reversion of the dower of his wife's mother, and not the dower itself, and that no dower having been assigned by metes and bounds, the grantee took, by his deed, an undivided two thirds of the estate in common. *Id.*
5. **ESTATE CONVEYED TO MARRIED WOMAN UNDER AGE** vests in her, subject only to be divested in case she shall disagree to it when discovered, and of full age. *Scanlan v. Wright*, 344.

MASTER AND SERVANT.

See APPRENTICESHIP.

MORTGAGES.

1. **MORTGAGE OBTAINED BY A FALSE REPRESENTATION** by the mortgagee is void, even though he did not know the representation to be false, if the other party believed it to be true, and was thereby induced to make the mortgage. *Joice v. Taylor*, 325.
2. **GIST OF THE INQUIRY** is not the knowledge of the falsity of the representation of the party making it, but the other party's belief of it to be true as stated, and his consequent deception by it if false. *Id.*
3. **MORTGAGEE HAS THE LEGAL ESTATE** in realty, especially after entry for foreclosure, and may alienate and transfer it by any of the usual modes of conveyance, subject to the mortgagor's right of redemption. *Hunt v. Hunt*, 400.

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4. MORTGAGEE HAS CONSTRUCTIVE POSSESSION be through the possession of the mortgagor, who
5. DEED OF QUITCLAIM AND RELEASE by a mortgation to one not in possession, conveys the
6. MORTGAGEE CONVEYING TO A PURCHASER of t a pecuniary consideration, by a deed of quit ranty against himself and those claiming u without merging or extinguishing the mortg chaser of the equity of redemption, where of the conveyance. *Id.*
7. MORTGAGOR CAN NOT DISSEISE the mortgagee, other improvements on the land. *Id.*
8. OPEN AND PEACEABLE ENTRY by mortgagee, i for the purpose of foreclosure, after condition possession, and operates as an ouster of t *Smith v. Shepard*, 432.
9. THREAT BY MORTGAGEE IN ACTUAL POSSESSIO mortgagor, unless he agree to pay the rent a complete eviction of such lessee. *Id.*
10. ON A FORECLOSURE of a mortgage on lands, subsequently conveyed by the mortgagor to be sold in the inverse order of their alienati 528.
11. SALE, ACCOMPANIED BY AGREEMENT TO RE in a proper case, but the court watches suc them to be securities, unless a contrary in circumstances. *Gillis v. Martin*, 729.
12. DEED, ABSOLUTE IN FORM, WHEN TREATED the time of the delivery of an absolute dee written agreement, stipulating that, if wi should be sold for more than the amount interest and cost of necessary repairs, he grantor, such deed will be treated as a mor to show that it was otherwise intended by
13. RIGHT TO REDEEM can not be barred by any contract, that the purchaser should, in defi absolute owner, if the subject was once red
14. MORTGAGEE IN POSSESSION IS ENTITLED t with interest thereon. *Id.*
15. GENERAL RULE IN CASE OF NEW IMPROV they throw difficulties in the way of reden
16. IMPROVEMENTS, PERMANENT AND BENEFIC would be wholly unproductive, and which in the belief that the estate was his own,
17. MORTGAGEE SHOULD NOT BE CHARGED WI improvements that he himself has made.
18. SALE IS DECREED UPON A BILL FOR FOR redeem, a sale will not be decreed, unless *Id.*

MUNICIPAL CORPOR

See STREETS.

MURDER.

See CRIMINAL LAW, 2, 5.

NAVIGATION.

See WATER-COURSES.

NE EXEAT.

THE WRIT OF NE EXEAT IS IN THE NATURE OF EQUITABLE BAIL; and, to entitle one to such bail, there must be a present debt or duty, or some existing right to relief against the defendant or his property, either at law or in equity. *De Rivafranki v. Corsetti*, 532.

NEGLIGENCE.

See BRIDGES; SHIPPING, 7.

NEGOTIABLE INSTRUMENTS.

1. AN INDORSEE AFTER MATURITY of a negotiable promissory note is considered as receiving dishonored paper, and takes it subject to all the infirmities, equities, and defenses to which it was liable in the hands of the payee. *Robinson v. Lyman*, 52.
2. BUT SUCH INFIRMITY, EQUITY, OR DEFENSE MUST EXIST and attach to the note before its transfer, in order that it may be set up against the instrument in the hands of an indorsee after maturity. *Id.*
3. *IDEM.*—Therefore, an agreement made by the makers and payee of a note while it is in the latter's hands, that sums paid by the former on certain notes of the latter might be applied on the note in question, may be set up against an indorsee after maturity. *Id.*
4. *IDEM.*—But a similar agreement made after the matured note had been transferred is not an equity attaching to the note while in the payee's hands, and is not available against the transferee. *Id.*
5. AN INDORSEMENT OF A SUM PAID on a note raises no presumption as to what time thereafter it was negotiated. *Id.*
6. IT IS NO DEFENSE AGAINST THE HOLDER of the legal title to a note that the beneficial ownership is in another, unless there be shown, in addition, facts constituting a valid defense against the beneficial owner. *Newton v. Turner*, 173.
7. *IDEM.*—It is no objection in such case that the defense against the beneficial owner accrued posterior to the time that he passed the legal title. *Id.*
8. PROMISSORY NOTE payable "on demand, with interest after four months," with the words "on demand" erased by drawing lines through them, is not due until four months from the date thereof, and such erased words, being still legible, may be resorted to in determining that such was the intention of the parties. *Hobart v. Dodge*, 214.
9. DEMAND OF PAYMENT of a note payable at the dwelling-house of the makers is sufficient if demand is made, of both such makers, at the barn-yard of one of them, and no objection is made by either as to the place where payment is thus demanded. *Baldwin v. Farnsworth*, 252.
10. HOLDER OF NOTE PAYABLE AT A PARTICULAR PLACE is not bound to present it for payment at any other place; and a refusal to pay on present-

- ment at another place is not a dishonor upon which the indorser can be charged. *North Bank v. Abbot*, 334.
11. NOTE PAYABLE AT EITHER OF THE BANKS of a city in which there is a large number of banks, is a contract to pay at either of such banks that the holder may select. *Id.*
 12. SUCH NOTE BECOMES ONE PAYABLE AT A PARTICULAR PLACE from the time that the maker is notified at which of such banks it is, and his subsequent failure to pay it there is a dishonor upon which the indorser will become liable, on due notice being given to him. *Id.*
 13. PROOF THAT ESTABLISHES PLAINTIFF'S RIGHT TO RECOVER on a note will support the declaration in all cases where the note is given in evidence; and although such declaration alleges presentment and demand, they need not be proved if they were not necessary. *Id.*
 14. PROMISSORY NOTE MADE TO EQUALIZE THE DISTRIBUTION of the estate of the promisor, without other consideration, is *nudum pactum*, and can not be enforced. *Parish v. Stone*, 378.
 15. NOTE GIVEN FOR TWO DISTINCT CONSIDERATIONS, one valid and the other not, being partly a compensation for services, and partly a gratuitous gift, must be apportioned as between the original parties and those standing in the same relation, and the holder shall recover so far as it is valid. *Id.*
 16. JURY MUST DETERMINE WHAT PART of such note is founded on the valid consideration, if the parts are not respectively liquidated and ascertainable by computation. *Id.*
 17. A NOTE PAYABLE "in good leather, such as suits," is payable in such leather as would suit the payee. *Bailey v. Simonds*, 454.
 18. WHERE A NOTE IS PAYABLE IN GOODS at a particular place, on demand, the maker is bound to have the goods always ready. *Id.*
 19. TO MAKE AN INSTRUMENT NEGOTIABLE, no particular form of words is necessary. The following is sufficient: "Oct. 19, 1830. Good to R. C., or order, for thirty dollars, borrowed money. J. W. M." *Franklin v. March*, 462.
 20. THE WORDS "VALUE RECEIVED" are not essential. *Id.*
 21. AN INDORSEE, AFTER A NOTE IS PAYABLE, who learns from the maker circumstances which might have been a good defense, is entitled to recover where the maker says he will pay if indulgence is granted, and such indulgence is given. *Id.*
 22. DESTRUCTION OF NOTE, WHEN MUST BE PROVED.—An action for money lent on a promissory note is substantially an action on the note, and if the declaration allege that the note has been worn out and destroyed, the plaintiff must, on the trial, prove its destruction. *Vananken v. Hornebeck*, 509.
 23. SPECIAL COUNT IS UNNECESSARY in declaring on a lost or destroyed note. *Id.*
 24. WHERE, IN ACTION FOR MONEY LENT, it comes out on the trial that a note was given for the debt, the note must be produced, or its loss or destruction proved. *Id.*
 25. EVIDENCE OF DESTRUCTION OF NOTE, WHAT INSUFFICIENT.—Testimony of a witness that he heard the plaintiff, in anger, say that he would burn the note, and that witness saw the plaintiff throw a paper in the fire, is not sufficient evidence of the destruction of the note. *Id.*

26. ALTERATION OF DEED by the party to whom it belongs, even in an immaterial part, avoids the deed; this rule applies to all written contracts, and particularly to promissory notes and bills of exchange. *Id.*
27. INTENTIONAL DESTRUCTION OF NOTE by party to whom it belongs destroys his right of action on it. *Id.*
28. PROMISE TO PAY NOTE THAT HAS BEEN DESTROYED by the owner thereof, does not dispense with the necessity of its production, or proof of its loss or destruction. Such promise would be *nudum pactum* and void, unless made upon some new consideration. *Id.*
29. A DUE BILL in the words "Due K. and K. three hundred and twenty-five dollars, payable on demand. October 20, 1821," and signed, is a promissory note. An acknowledgment of indebtedness implies a promise to pay. *Kimball v. Huntington*, 590.
- See AGENCY, 7, 8, 9; CONSIDERATION, 1, 2, 3; CONTRACTS, 13; GIFTS.

NEW TRIALS.

THE ASSURANCE OF THE JUDGE that a judgment should be different from that which was afterwards rendered and entered can not be relied upon in equity as a ground for decreeing a new trial. *Green v. Dodge*, 736.

NOTICE.

1. STATUTE REQUIRING NOTICE to be given, and the service of it to be proved in a particular mode, must be strictly pursued. *Newby v. Perkins*, 160.
2. STATUTE REQUIRING THAT BEFORE A PARTITION of land can be had among heirs, written notice thereof must be given to all persons interested therein, and that the service of such notice shall be proved by affidavit, must be strictly pursued, and the sheriff's return, that he has "executed" such notice, can not be substituted for such affidavit. *Id.*
3. WHERE A STATUTE PRESCRIBES a peculiar and exclusive mode of giving and proving the service of notice in the class of cases for which it provides, the general law authorizing the sheriff to serve any notice has no application. *Id.*
4. CONSTRUCTIVE NOTICE from the registry of a mortgage is not sufficient to charge an assignee who sues for the breach of a covenant of warranty. *Suydam v. Jones*, 552.
5. NOTICE TO PRODUCE A LETTER CONCERNING AN EXECUTION, produced on a former trial, "and all other papers" in the defendant's custody "relating to the matter in controversy in this cause," is sufficient to require the production of the execution, in an action for money collected thereon, and to let in secondary evidence of the contents of such execution, where the letter and execution were produced by the defendant himself on the former trial. *Walden v. Davison*, 602.
6. NOTICE TO PRODUCE PAPERS IS SUFFICIENTLY SPECIFIC if it fairly apprises the party of the circumstances, as to what particular papers are wanted. *Id.*
7. POSSESSION IS NOTICE TO ALL THE WORLD of the nature and extent of the possessor's interest. *Parks v. Jackson*, 656.

See BONA FIDE PURCHASERS; LIS PENDENS.

NOVATION.

See SHIPPING, 2.

NUISANCE.

REQUEST TO ABATE NUISANCE must be made to him who did not erect such nuisance, before an action can be maintained against him for continuing it. *Pierson v. Glean*, 497.

OFFICE AND OFFICERS.

1. **A PUBLIC OFFICE IS THE PROPERTY OF THE INCUMBENT**, subject, however, to legislative control in all that concerns the interest of the community, and the legislature may therefore increase the duties, diminish the emoluments, or even abolish the office. *Hoke v. Henderson*, 677.
2. **IDEM.**—But the legislature can not, while leaving the office in existence, lessen the tenure by which the incumbent holds, nor can it, during the term for which the incumbent holds, transfer the office to another. *Id.*
3. **BUT WHERE THE OFFICE IS NEITHER LUCRATIVE NOR HONORARY**, but is only established for the public weal, there the incumbents may be discharged and their duties transferred to others, at the pleasure of the legislature. *Id.*

See **DEFINUM**.

PARTITION.

1. **VENDEES OF ONE WHO, UPON TAKING UNDER A WILL**, was compelled to relinquish the land which he had sold as his own, but which the testator had devised to others, will not be affected by any partition among the devisees, to which they, the vendees, were not parties. *Gore v. Stevens*, 141.
2. **PARTITION AMONG COPARCENERS**, made under an order of a county court, without legal notice to all interested, is invalid. *Newby v. Perkins*, 160.
3. **UPON THE PARTITION OF A TRACT OF LAND** among coparceners, by an order of a county court, no judgment for costs can be given for or against any of them, there being no contest. *Id.*

See **ALIENS**, 3.

PARTNERSHIP.

1. **ASSUMPSIT MAY BE MAINTAINED** by one part owner of a ship against another, to recover the excess contributed by him in building the ship, over and above his share, although there has been no liquidation of their accounts, nor balance ascertained, nor any express promise to pay such excess. *Marshall v. Winslow*, 264.
2. **ADMISSION BY ONE PARTNER, AFTER DISSOLUTION** of the partnership, that a particular debt of the firm was not paid, though a receipt had been given therefor, is evidence against his copartner, particularly where such admission is made by the active partner, who has been constituted agent to settle up the firm business. *Bridge v. Gray*, 358.
3. **CREDITOR BEFORE JUDGMENT** may sustain a bill against deceased partner's administrator to compel the distribution of the estate. *Grosvenor v. Austin*, 743.
4. **PARTNERSHIP CREDITORS** are entitled to be paid out of firm assets, in preference to creditors of its individual members. *Id.*
5. **SEPARATE CREDITORS** of a decedent are not entitled to preference over creditors of a firm of which he was a member. *Id.*

See **STATUTE OF LIMITATIONS**, 1, 2.

PATTERNS.

INVENTION, TO BE THE SUBJECT OF A ~~PATENT~~, must be useful for some beneficial purpose. *Dickinson v. Hile*, 303.

PLEADING AND PRACTICE.

1. A GENERAL PLEA OF "FRAUD, COVIN, AND FALSE REPRESENTATION" is a sufficient plea in bar to an action on a writing obligatory, to entitle the defendant to show any false, fraudulent, or covinous conduct of the obligee in procuring the execution of the writing, from which it would appear that, in legal effect, the obligor never executed the bond. *Huston v. Williams*, 84.
2. A PLEA THAT A BOND IS VOLUNTARY and without either a good or valuable consideration, is sufficient, because in such a case there are no special facts to aver. *Id.*
3. IF A DEFENSE IS FOUNDED UPON A TOTAL OR PARTIAL FAILURE of consideration, or upon fraudulent acts or representations affecting the consideration, the special facts must be pleaded. *Id.*
4. THE JOINING OF SEVERAL CREDITORS OF A PRECEDENT in a creditor's bill to vacate a fraudulent conveyance is proper. *Dugan v. Vattier*, 105.
5. FAILURE TO ANSWER ADMITS the allegation of a bill, without any proof thereof. *Hanly v. Blackford*, 114.
6. DECREE WILL NOT BE REVERSED for the improper admission of a deposition, if there is other proof to support it. *Id.*
7. NEITHER THE REMOTE GRANTOR, from whose vendee the contending parties both derive title, nor his heirs, are necessary parties to a suit between such contending parties affecting the title to the land. *Id.*
8. JUDGMENT WILL NOT BE REVERSED because relevant testimony has been admitted at an improper time. *Wilson v. Bibb*, 118.
9. ACTION MAY BE MAINTAINED AGAINST ONE OBLIGOR, upon a joint bond of himself and another; and such bond is sufficiently described in the declaration, either as the bond of the defendant alone, or as the bond of both. *Allin v. Shadburne*, 121.
10. SAME PERSON CAN NOT BE BOTH OBLIGOR AND OBLIGEE in the same undertaking, nor both plaintiff and defendant in the same action. *Id.*
11. INSTRUCTIONS OF AN INFERIOR COURT will, on appeal, be considered with reference to the evidence before that court when they were given, and if they can be sustained so far as there was evidence to which they were applicable, the judgment will not be reversed, although such instructions taken literally may be erroneous. *Million v. Riley*, 149.
12. NOTICE OF AN EQUITY does not affect the rights of a party in a trial at law. *Id.*
13. THE NON-JOINDER OF A CO-DEBTOR, to be taken advantage of, must be pleaded; but where, after issue joined, the case is as to certain of the proper parties discontinued, there that fact can be taken advantage of on the trial. *Mayor of New Orleans v. Ripley*, 175.
14. ERROR IN ADMITTING PROOF will not be cause for reversal, if the fact proved could not vary the legal responsibility of the parties. *Shepherd v. Lanfear*, 181.
15. RECORDS, WHEN PROPERLY CERTIFIED.—Where two records of a court of Kentucky were produced, they being attached by being sewed together.

- and to the first in point of date there was a certificate of the clerk of the court alone, to the latter certificates of both clerk and judge, the certificate of this latter officer referring to the certificate of the clerk on the first record, there the first record was held properly certified. *West v. McConnell*, 191.
16. **MATTER NOT PLEADED** may be given in evidence when its materiality has been caused by conduct of the plaintiff at the trial. *Id.*
 17. **AN ALLEGATION IS TOO GENERAL TO ALLOW OF PROOF** in its support, if it is to the effect, "that plaintiff is indebted to defendant in the sum of," etc. *Pargond v. Guice*, 202.
 18. **COURT SHOULD CHARGE THE JURY** upon the law applicable to the facts proved, and not answer abstract questions not arising in the case. *Hathorn v. Stinson*, 228.
 19. **NON-JOINDER**.—Under the general issue in *assumpsit*, defendant may show that there are other persons jointly interested with the plaintiff in the cause of action sued on, and it is not necessary to plead such matter in abatement. *Marshall v. Jones*, 260.
 20. **THERE IS NO DEPARTURE IN PLEADING** where the plaintiffs suing on an appeal bond describe themselves in the writ, which is in the *detinet* only, as "executors of," etc., and in the declaration which recites the writ, as "the said plaintiffs," and again describe themselves in the replication as "executors of," etc., and in their demurrer to the defendant's rejoinder, as "the said plaintiffs." *Sasscer v. Walker*, 272.
 21. **ADDITION OF THE WORD "EXECUTORS"** is mere surplusage, and not an irregularity in the writ, etc., where the plaintiffs are suing on an appeal bond given to them as executors, upon which they can maintain an action only in their individual capacity, the demand being the same. *Id.*
 22. **OBJECTION THAT THE WRIT IS IN THE DETINET ONLY**, where the plaintiff sues on a contract in his own right, can not be raised on general demurrer since the statute of 4 and 5 Anne, c. 16. *Id.*
 23. **TO ENTITLE THE APPELLEE TO SUE** on an appeal bond, the issuance of a *fi. fa.* or *vend. ex.* is unnecessary. *Id.*
 24. **RIGHT TO SUE ON AN APPEAL BOND** after affirmance of the judgment, is not impaired by the return of a *fi. fa.* on the judgment "not sold for want of bidders," and the issuance and return of a *vend. ex.* "not sold by order of the plaintiffs." *Id.*
 25. **ENTRY OF FINAL JUDGMENT** without swearing a jury of inquiry to assess the damages in an action on appeal bond, on overruling a demurrer to the defendant's rejoinder to the replication assigning breaches, is erroneous. *Id.*
 26. **IF SUCH POINT OR QUESTION WAS NOT PRESENTED** to, or decided by, the court below, the judgment will not be reversed for such error, under the statute of 1825, c. 117, sec. 1. *Id.*
 27. **QUESTION MAY BE PRESENTED** by a motion in arrest of judgment. *Id.*
 28. **RULES OF PLEADING IN EQUITY** are not so strict in matters of form as at law. *Birely v. Staley*, 303.
 29. **TWO CREDITORS MAY UNITE IN A BILL** to vacate a conveyance by their debtor as fraudulent and void, under the statute of Elizabeth. *Id.*
 30. **FUND REALIZED ON VACATING SUCH CONVEYANCE**, at the suit of one or more creditors, is retained in court until all the creditors are notified to come in and assert their claims. *Id.*

31. ALLEGATION THAT THE COMPLAINANTS PROCEED on behalf of themselves and other creditors in such a suit, is unnecessary where the prayer is that the property be sold for the benefit of the creditors. *Id.*
32. WANT OF AN ALLEGATION THAT THE COMPLAINANTS WERE CREDITORS at the time of filing of their bill, is obviated by an answer substantially admitting that they were creditors. *Id.*
33. OBJECTION RAISED FOR THE FIRST TIME in the appellate court, after a trial on the merits, that a creditor seeking to vacate a fraudulent conveyance by his deceased debtor of his realty, that such creditor has not alleged or shown that he obtained a judgment in the debtor's life-time, will be reluctantly listened to, and the court will be astute to discover a method of frustrating it. *Id.*
34. WHERE THE INFERENCE that there is no personal representative against whom judgment could have been obtained in such a case, and that there are no assets, is justified by all the circumstances, the objection raised first in the appellate court that the complainant has not shown a judgment, and that the personal representative has not been made a party, will be deemed obviated. *Id.*
35. COMPLAINANT WOULD NOT BE REQUIRED to take out letters of administration himself in such a case before bringing suit, since he could take no proceedings against himself. *Id.*
36. ONUS ON GRANTEE TO SHOW THAT GRANTOR HAD OTHER ESTATE, WHEN.—Where a grantee, in answer to a bill filed by his grantor's creditor, charging that the conveyance was fraudulent, and embraced all the debtor's estate, denies such allegation, and avers that the debtor had other estate in a particular county sufficient to pay the complainant, the burden is on him to prove that fact. *Id.*
37. PRODUCTION OF CONVEYANCES without proving the existence of the property and the grantor's title or possession, or the grantor's possession thereof, is wholly insufficient to support such allegation. *Id.*
38. ANSWER THAT THE GRANTOR HAD OTHER ESTATE is no bar to a decree in favor of the complainant, in such a case, unless it is also alleged that such estate was sufficient to pay not only the complainant, but all the creditors of the grantor. *Id.*
39. MATERIAL ALLEGATION IN A BILL, though not denied, must be proved. *Joice v. Taylor*, 325.
40. WHERE AN ANSWER OBJECTS TO THE WANT OF PROPER PARTIES, the complainant should amend his bill before any further proceedings are had in the cause. *Van Epps v. Van Deusen*, 516.
41. *IDEM.*—If he neglects to do this, the court may, at the hearing, permit the cause to stand over for the purpose of bringing the proper parties before the court, on payment of costs to the adverse party, or dismiss the bill, with costs. *Id.*
42. *IDEM.*—The proper course in such case, if the cause is not permitted to stand over, is to dismiss the bill without prejudice to the claim, or right of the complainant, in any future litigation. *Id.*
43. *IDEM.*—If the objection of want of proper parties is raised at the hearing, for the first time, the bill should not be dismissed, where the defect can be remedied by an amendment or a supplemental bill, and the complainants elect so to do within a reasonable time; provided that necessary

parties were not left out of the bill, by the fraudulent or willful omission of the complainant, or in bad faith. *Id.*

44. **UNLESS A CAUSE IS TRIED AT THE APPOINTED TIME**, or within one hour, as a general rule such omission amounts to a continuance, and the cause is out of court. *Hunt v. Wickwire*, 545.
 45. **IDEM.**—If the justice is engaged at the hour in trying another cause which occupies him till after the time, it is a good reason for the delay, and he may proceed, if he does so, as soon as possible after his other official engagements are disposed of. *Id.*
 46. **IDEM.**—Where a cause in the justice's court is adjourned until one o'clock of a certain afternoon, and the justice is detained by other official duties until after five o'clock of the same day, up to which time the defendant had waited, the justice may proceed with the trial, although the defendant has departed. *Id.*
 47. **ON OVERRULING A DEMURRER**, a justice has discretion to allow the defendant to plead; but should such discretion be abused, the court of common pleas ought to interfere. *Sloan v. Case*, 569.
 48. **UPON A PLEA PUIS DARRIEN CONTINUANCE**, all previous pleas are, by operation of law, stricken from the record, and everything is confessed except the matter contested by the plea. *Kimball v. Huntington*, 590.
 49. **JUDGE'S OBSERVATION** in his charge, that a witness' testimony differs materially from a statement which he is said to have made out of court, such being the fact, is not error. *People v. Genung*, 594.
 50. **APPELLATE COURT IS CONFINED TO PROOFS** upon which the decree impeached for error was founded. *Gillis v. Martin*, 729.
 51. **ANSWER, AFTER REPLICATION**, is NOT EVIDENCE for the defendant, unless it is made so by discoveries called for in the bill. *Id.*
- See **ALIBI**, 3; **COSTS**; **LIENS**, 3, 4; **NEGOTIABLE INSTRUMENTS**, 22, 23; **TERMS**.

PRINCIPAL AND AGENT.

See **AGENCY**.

PRINCIPAL AND SURETY.

See **SURETYSHIP**.

PRIVILEGED COMMUNICATIONS.

See **ATTORNEY AND CLIENT**.

PROCESS.

1. **RETURN OF AN OFFICER ON A WRIT**, as to the service of it, is conclusive on the parties to the suit, and can not be contradicted except in an action against the officer for a false return. *Stinson v. Snow*, 238.
2. **A SHERIFF MUST USE ALL REASONABLE ENDEAVORS** to execute process. He should inquire for the defendant at his home, and should not rely upon vague inquiries made on the street. *Hinman v. Borden*, 568.

PUBLIC SQUARES.

See **HIGHWAYS**.

QUANTUM MERUIT.

See ACTIONS; CONTRACTS, 15, 16.

QUIA TIMET.

See EQUITY, 5.

REAL ESTATE.

LAND DESCRIBED IN A DEED AS TEN ACRES, "adjoining him (the vendee) on the north," is properly laid off, by extending it as far upon the northern boundary as the vendor's land extends. *Hanly v. Blackford*, 114.

REMAINDERS AND REVERSIONS.

1. TENANT FOR LIFE MAY BE REQUIRED to keep down the interest out of the profits where there is a devise of lands, or a specific bequest of a chattel for life, with remainder over, and the subject is charged with debts not equal to the whole value; but the remainder-man can, in no case, require the whole profits to be applied in extinguishing the charge for the sake of saving the subject. *Smith v. Barham*, 721.
2. RESIDUARY BEQUEST FOR LIFE, with remainder over, of articles that are consumed in the using, where such bequest includes other articles of a different nature, gives to the tenant for life the interest only, and the executor must sell the whole of the property, and reserve the principal for the remainder-man. *Id.*
3. SLAVES ARE AN EXCEPTION to this rule, because they are not wasted by use, or if they are, the waste is supplied by their increase, which goes to the remainder-man. *Id.*

REPLEVIN.

1. DEMAND, WHEN REQUIRED.—A party rightfully in possession of property belonging to another, does not unlawfully detain it, until after a demand by the true owner, and a refusal to deliver the possession. *Galvin v. Bacon*, 258.
2. WHERE THE TAKING OF THE PROPERTY is tortious, no demand is necessary. *Id.*
3. WHOEVER TAKES THE PROPERTY of another, without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in law, tortiously. *Id.*
4. POSSESSION OF PROPERTY ACQUIRED by a person purchasing from a bailee, who has no authority to sell, is tortious, and the owner may maintain replevin therefor without demand or notice. *Id.*
5. REPLEVIN WILL LIE against a plaintiff in execution, by whose direction it is levied upon property of a third person. *Allen v. Crary*, 566.
6. REPLEVIN LIES for any tortious or unlawful taking of the property of another; it will lie where trespass *de bonis asportatis* can be sustained. *Id.*

RES JUDICATA.

1. TO BAR AN ACTION BEFORE A JUSTICE OF THE PEACE on the ground of a prior suit between the same parties, it must be shown that such prior suit was tried, and that the demand now in suit could have been joined in the former action with the demand there sued upon. *Carson v. Clark*, 79.

2. JUDGMENT IN AN ACTION FOR THE BREACH of a covenant against incumbrances in a deed, is no bar to a subsequent action for the breach of a covenant of warranty in the same deed. *Donnell v. Thompson*, 216.
3. JUDGMENT ONLY PRIMA FACIE EVIDENCE, WHEN.—A judgment rendered in an action in which, among other counts, there was a general one for goods sold and delivered which might have included a particular account, is, when pleaded in bar of a subsequent action on that account, only *prima facie* evidence of a former recovery thereon. *Bridge v. Gray*, 358.
4. EVIDENCE ALIUNDE IS ADMISSIBLE in such a case to show that the demand sued for was not considered in a former action. *Id.*
5. A PLEA OF FORMER RECOVERY in another state, and satisfaction of the judgment by a proceeding unknown to the common law, but alleged to be authorized by the statute of such state, should set out the statute, that the court may see how such proceedings constitute a bar to the plaintiff's action. *Holmes v. Broughton*, 536.
6. TO RENDER A FORMER RECOVERY ADMISSIBLE in evidence, the verdict or judgment must be between the same parties, or those claiming under them; a verdict or judgment is not binding upon a third person who has not had an opportunity to make a defense, or to appeal from the judgment if erroneous. *Lawrence v. Hunt*, 539.
7. PARTIES TO FORMER PROCEEDING DIFFERENT.—A former recovery is admissible, where the party against whom it is offered was sued jointly with another in such former proceeding, and had an opportunity of contesting it, although that other is not a party to the subsequent action. *Id.*
8. THE JUDGMENT OF A COURT OF CONCURRENT JURISDICTION, or one in the same court directly on the same point, is as a plea in bar, and as evidence conclusive between the same parties upon the same matter directly in question in another suit; but is no evidence of matters which come collaterally in question merely, nor of matters incidentally cognizable, or to be inferred only by argument or construction from the judgment. *Id.*

RESCISSION OF CONTRACTS.

See VENDOR AND VENDEE, 5, 6, 8, 11.

REWARD.

See LOST ARTICLES.

SALE.

1. A CONTRACT PROVIDING FOR THE DELIVERY of a spinning machine at a time and place certain, is sufficiently complied with, if such machine is delivered and received without objection, at a subsequent time. *Baldwin v. Farnsworth*, 252.
2. SELLER OF PERSONAL PROPERTY IS NOT LIABLE for defects in its quality or condition, as a general rule, without an express warranty or fraud. *Hyatt v. Boyle*, 276.
3. SALE OF TOBACCO as being of "Parkin's crooked brand," imports no warranty as to the quality of the tobacco, further than that it is of that brand, and though the purchaser agrees to pay the full price of a merchantable commodity, he can not, on discovering it to be unsound and

- unmerchable, offer to return it and resist an action for the price, if the tobacco is of the stipulated brand, and there is no express warranty, or knowledge of the unsoundness by the vendor. *Id.*
4. DELIVERY OF ANY TOBACCO NOT OF THAT BRAND, however excellent its quality, would not, in such a case, be a compliance with the terms of sale. *Id.*
 5. EXCEPTION THAT WHERE THERE IS NO OPPORTUNITY FOR INSPECTION of an article by the buyer, there is an implied warranty of its quality, applies only where the inspection is, morally speaking, impracticable, as where goods are sold before arrival or landing. *Id.*
 6. THAT THE INSPECTION WOULD BE INCONVENIENT or difficult, is not sufficient in such a case. *Id.*
 7. KNOWLEDGE BY THE VENDOR THAT TOBACCO IS BOUGHT FOR SALE, imports no warranty, it seems, that it is suitable for that purpose, where the tobacco is of the particular brand which the vendee contracted to purchase. *Id.*
 8. SCIENTER OF THE VENDOR IS IMMATERIAL when there is an express warranty of the goods, and an offer to return them in due time after discovering their unsoundness. *Id.*
 9. CASE OF OSGOOD v. LEWIS, 2 Har. & G. 295 [18 Am. Dec. 317], explained. *Id.*

SET-OFF.

See ASSIGNMENT, 1, 2.

SHERIFFS.

1. IF AN OFFICER, IN EXECUTING A PROCESS, BE A TRESPASSER, those who aid him or act by his command are trespassers. *Elder v. Morrison*, 548.
2. IF A STRANGER AID AN OFFICER in doing a legal act, but the officer, by reason of some improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser. Where a sheriff has power to do a particular act, his authority is a justification to all who come in his aid. *Id.*
3. SHERIFF CAN NOT COMMAND OTHERS TO DO AN UNLAWFUL ACT.—Men are bound to know the law if they obey his unauthorized commands, or if they disobey his lawful commands they act at their peril. *Id.*
4. INDEMNIFYING AN OFFICER does not confer on him any authority which he did not have before. *Id.*
5. ONE WHO, IN AID OF AN OFFICER and in obedience to commands which he had no power to make, lays hands on another, is liable for an assault and battery. *Id.*

See EXECUTIONS; PROCESS.

SHERIFFS' DEEDS.

See EXECUTIONS, 26.

SHIPPING.

1. ONE FURNISHING NECESSARY SUPPLIES to a vessel has a remedy to enforce payment therefor, against either vessel, owners, charterers, or master. *Henshaw v. Rollins*, 180.
2. *IDEM*—NOVATION.—That such person has charged such supplies to the charterer will not *per se* act as a novation and release the other parties. *Id.*

3. **THE TIME OF DELIVERY** may be lengthened, from the time stipulated in the bill of lading, by regulations of the port of delivery, without thereby discharging the shipping contract. *Shepherd v. Lanfear*, 181.
4. **THE PLACE OF DELIVERY** may be likewise altered; therefore, where the undertaking was to deliver at the usual place of discharge at "A," and the vessel upon arrival at "A" was put in quarantine, the shipper was held liable for refusing a delivery at "B," the usual place of discharge for vessels under such circumstances. *Id.*
5. **THE MASTER IS LIABLE** as for breach of duty for inhuman and indecent conduct towards the passengers, by himself and crew, where incited by him. *Keene v. Lizardi*, 197.
6. **THE OWNERS OF A VESSEL ARE LIABLE** for all breaches of duty of the master in his conduct towards passengers. *Id.*
7. **LIABILITY FOR INJURY FROM TOWED VESSEL.**—Where a vessel in tow of a steamboat employed in the business of towage, through the negligence of the master and crew of such steamboat, comes in collision with another vessel, the owner of the towed vessel is not liable for damages occasioned thereby. *Sproul v. Hemmingway*, 350.

See **GENERAL AVERAGE**.

SLANDER.

1. **A COUNT IN SLANDER** not setting out the words alleged to be slanderous, is bad, even after verdict. *Purnons v. Bellows*, 461.
2. **IN MITIGATION OF DAMAGES** in slander, the defendant may give evidence of the plaintiff's general bad character, but not of particular facts tending to impeach his character. *Lamos v. Snell*, 468.
3. **IDEM.**—The evidence as to general character is not confined to the plaintiff's character in respect to the matters charged in the slander. *Id.*
4. **TO CHARGE ONE WITH STEALING** that which can not be stolen, is not of itself actionable. *Ogden v. Riley*, 513.
5. **WORDS NOT ACTIONABLE.**—"John Ogden has stole my marle;" "you are a thief, you have stolen my marle," are not actionable. *Id.*
6. **WORDS ARE TO BE TAKEN** in their plain and obvious meaning; the old rule that they are to be taken in *mitiori sensu* has been exploded. *Id.*

SPECIFIC PERFORMANCE.

1. **BILL FOR THE SPECIFIC EXECUTION** of a contract relating to chattels merely, does not lie where adequate remedy lies at law. *Cowles v. Whilman*, 60.
2. **IDEM.**—Where one buys shares in the name of another, a bill against the administrator of that other for the transfer of these shares will lie, it being a case of trust. *Id.*
3. **IT IS NO DEFENSE TO A BILL TO ENFORCE A TRUST** that the complainant is indebted to the estate of the *cestui que trust*, as such indebtedness is to be adjusted by the court of probate. Nor is it a defense that a decree enforcing the trust would take the subject-matter thereof out of the jurisdiction of the probate court, as it always was in equity, and should not be distributed in the administration of the estate. *Id.*
4. **SPECIFIC ENFORCEMENT OF A CONTRACT** in writing for the sale of land, which contains no description or reference identifying the land, can not

be decreed consistently with the statute of frauds. *Hanly v. Blackford*, 114.

5. EQUITY WILL NOT SPECIFICALLY ENFORCE an implied agreement to surrender the possession of slaves. *Waller v. Demint*, 134.
6. A SPECIFIC PERFORMANCE OF A CONTRACT will not be decreed upon a bill filed prior to the time at which the contract is to be performed. *De Rivaflinoli v. Corsetti*, 532.

STATUTES.

1. IN CONSTRUING A STATUTE, if the words are ambiguous, resort should be had to the probable consequences which would arise from the one or the other construction. *Hoke v. Henderson*, 677.
2. *IDEM.*—But if the meaning of the language of the statute be plain, there can be no such resort. *Id.*

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS RELATING TO CONTRACTS for the sale of goods, etc., can not be made available as a defense, except by him who is sought to be charged by such contract, or his legal representatives. *Cowan v. Adams*, 242.
2. A CONTRACT OF SALE OF TREES growing upon land is within the statute of frauds, and should be in writing. *Putney v. Day*, 470.
3. A PROMISE TO PAY THE DEBT OF ANOTHER is not within the statute of frauds, where it is upon an original consideration of benefit or harm, moving between the newly contracting parties. *Cooper v. Chambers*, 710.

See BOUNDARIES.

STATUTE OF LIMITATIONS.

1. ACKNOWLEDGMENT BY A PARTNER that a firm debt is still due, although made after the dissolution of the partnership, and while such partner is insolvent, is admissible against his copartner to avoid the bar of the statute of limitations. *Austin v. Bostwick*, 42.
2. *IDEM.*—But such acknowledgment is entitled to little weight if not honestly made, but rather with a design to charge the copartner. *Id.*
3. RECOGNITION OF A DEBT AS ORIGINALLY JUST and still due is sufficient to remove the bar of the statute of limitations. *Id.*
4. ACKNOWLEDGMENT MADE BEFORE THE STATUTE HAD RUN, postpones the running of the statute from that time. *Id.*
5. TO TAKE A JOINT DEBT OUT OF THE STATUTE, it is not essential that the acknowledgments of the parties should be a joint act to render them effective. *Id.*
6. PAYMENT OF A PART OF A DEBT is evidence of a promise to pay the remainder, so as to prevent the operation of the statute of limitations as a bar. *Newlin v. Duncan*, 66.
7. AN ACKNOWLEDGMENT OF A SUBSISTING DEMAND, or any recognition of an existing debt, is evidence of a promise to pay it. *Id.*
8. AN ACKNOWLEDGMENT REBUTS THE PRESUMPTION OF PAYMENT arising from lapse of time. *Id.*
9. A SUBSEQUENT ACKNOWLEDGMENT revives the old debt, and does not create a new one. *Id.*

10. AN ACKNOWLEDGMENT MADE AFTER ACTION BROUGHT prevents the bar of the statute. *Id.*
11. A PAROL ACKNOWLEDGMENT is sufficient to revive a liability on a contract reduced to writing. *Id.*
12. THE ACTION SHOULD BE ON THE OLD DEBT, not on the new promise. *Id.*
13. EQUITY HAS NO JURISDICTION TO RELIEVE a person from the bar of the statute of limitations, although it appear that the defendant held certain slaves of the complainant, and that the time to bring an action at law for their recovery had been allowed to elapse by the latter by reason of certain offers of compromise made by the former. *Waller v. Demint*, 134.
14. STATUTE OF LIMITATIONS DOES NOT COMMENCE in favor of a factor until demand for payment or accounting is made on him. *Judah v. Dyott*, 112.
15. STATUTE OF LIMITATIONS, after it has begun to run, is not suspended by any of the disabilities, and therefore, in the case of a note, its operation is not suspended because, after it attached, the payee covenanted with the maker, in consideration of an assignment by the latter to his creditors, including the payee, to acquit and discharge him from all claim or demand, action or right of action, for the space of seven years. *Harvey v. Tobey*, 430.
16. IF A DEMAND BE NECESSARY to consummate a cause of action, the statute of limitations will not begin to run until such demand is made. *Sherrod v. Woodard*, 714.
17. THE STATUTE OF LIMITATIONS BEGINS TO RUN against the right of sureties to enforce contribution from the time of payments made on account of the principal. *Id.*
18. TERMS, BEYOND SEAS, are equivalent to beyond the state. *Richardson v. Richardson*, 745.

STREETS.

1. QUESTION OF THE NECESSITY OF EXTENDING a street in the city of New York can not be raised on a motion to confirm the report of the commissioners of assessment. *Matter of Albany Street*, 618.
2. WHERE ONLY PART OF A LOT IS REQUIRED for opening a street, the legislature can not constitutionally authorize the appropriation and sale of the residue without the owner's consent. *Id.*
3. DAMAGE TO THE OWNER OF PROPERTY by opening a street should be estimated according to the present value of the property to such owner, considering the extent of his interest in it. *Id.*
4. WHERE PART OF A CEMETERY is taken for a street, it should not be appraised according to its value as building lots. *Id.*
5. DAMAGE TO THE PROPERTY TAKEN and the benefit to the part that is left should be estimated according to the same rule. *Id.*
6. WHERE PROPERTY CAN NOT BE BENEFITED to the extent of the assessment upon it for opening a street, the report of the commissioners should be sent back, until it is so found or the proceeding is discontinued. *Id.*

SUBSCRIPTION.

See CONSIDERATION, 4.

SURETYSHIP.

1. THE PARTIES TO AN INSTRUMENT given as collateral security are not subject to the law of sureties. *Mayor of New Orleans v. Ripley*, 175.

2. ADMISSIONS OF A DECEASED PRINCIPAL are evidence against the surety, when they are made against the principal's interest at a time when he was well acquainted with the circumstances, and no motive to misrepresent appears. *Hinkley v. Davis*, 457.
3. NOTICE OF PAYMENTS, for principal, is requisite before bringing suit for contribution. *Sherrod v. Woodard*, 714.
4. SURETY RECEIVING MONEY OR CLAIMS to be applied to the payment of his principal's debt, holds as trustee of the creditor, and must account to him. *Green v. Dodge*, 736.

TAXATION.

1. PURCHASE BY A TAX COLLECTOR at his own sale is not absolutely void, but voidable, at the option of the owner of the property. *Pierce v. Benjamin*, 396.
2. OWNER'S RIGHT TO MAINTAIN TROVER for goods so sold is doubtful where he has not previously elected to annul the sale by a demand of the property or otherwise. *Id.*
3. COLLECTOR SELLING PROPERTY FOR TAXES after the expiration of the time prescribed by statute therefor, becomes a trespasser *ab initio*, though the original taking was rightful. *Id.*
4. OWNER MAY SUE IN TROVER WITHOUT A DEMAND AND REFUSAL in such a case, the taking constituting a conversion. *Id.*
5. OWNER DOES NOT WAIVE HIS RIGHT OF ACTION against a tax collector for an illegal seizure and sale of his property by paying the balance of the tax, and taking a receipt for the whole. *Id.*
6. MEASURE OF DAMAGES in such a case is the value of the property less the amount applied to the owner's tax. *Id.*

TENDER.

1. PLEA OF TENDER MUST SHOW an unqualified offer to pay the whole amount, and such plea admits the amount due and a readiness at all times to pay it. *Cary v. Bancroft*, 393.
2. TENDER OF A NOTE DUE THE DEFENDANT from the assignor of the plaintiff, and the balance in money, does not support a plea of tender. *Id.*

TERMS.

WHEN THE STATUTE SPEAKS OF TERMS, the terms constituted by law are meant, and not special motion days, known as special terms. *Smith v. Cutler*, 580.

TOLL-ROADS.

See BRIDGES.

TOWAGE.

See SHIPPING, 7.

TRESPASS.

1. FOR UNNECESSARY VIOLENCE TO CATTLE found trespassing, a person is liable. *Richardson v. Carr*, 65.
2. PLEA OF LIBERUM TENEMENTUM asserts title to the *locus in quo* in defendants. *Wilson v. Bibb*, 118.

3. IN TRESPASS Q. C. F. under such a plea, and issue thereon, evidence of paramount title in either party is admissible. *Id.*
4. RECORDS, PAPERS, ETC., BEARING UPON THE QUESTION OF POSSESSION are admissible under a plea of *liberum tenementum*. *Id.*
5. ACTION OF TRESPASS Q. C. F. IS FOUNDED upon the actual possession of the plaintiff; but if defendants have title, the damage done to the close is no injury to the possessor, who has no right. *Id.*
6. POSSESSION ALONE IS SUFFICIENT to maintain the action against all the world, except the rightful owner. *Id.*
7. POSSESSION IN THE PLAINTIFF AT THE TIME OF THE INJURY, or when the action is brought, is necessary to enable him to maintain trespass q. c. f. *Id.*
8. DEFENDANT BEING IN POSSESSION, although tortionally, will prevent a recovery in such an action. *Id.*
9. TRESPASS QUARE CLAUSUM FREGIT may be maintained by a plaintiff who has any title to the *locus in quo*, that continued down to the time of the alleged trespass; and a husband seized in right of his wife has, during her life-time, a title sufficient to maintain such action. *Adams v. Cuddy*, 330.
10. TRESPASS DE BONIS BY BAILOR.—A bailor, who loans his horses, has a constructive possession, which will support an action of trespass *de bonis asportatis*. *Root v. Chandler*, 546.
11. TRESPASS DE BONIS WILL LIE against one who directs an officer to detain property and indemnifies him for such taking. *Id.*
12. IN TRESPASS DE BONIS ASPORTATIS, evidence of justification is inadmissible under the general issue. *Id.*
13. TITLE TO LAND NOT IN ANOTHER'S POSSESSION, is sufficient to maintain trespass against a stranger. *Van Rensselaer v. Radcliff*, 582.
See ANIMALS; EXECUTIONS, 7, 8, 9, 10, 23; SHERIFFS; TRESPASS, 3.

TROVER.

1. TROVER LIES wherever trespass *de bonis asportatis* will lie. *Pierce v. Benjamin*, 396.
2. A BAILER IS LIABLE in trover where he refuses to deliver the property to one whom he knows to be the owner thereof, and from whom his bailor obtained the property wrongfully. *Doty v. Hawkins*, 459.
3. ONE FROM WHOM GOODS HAVE BEEN STOLEN may maintain trover, before the conviction or acquittal of the person accused of the taking. *Pettin-gill v. Rideout*, 473.
4. ACTUAL, FORCIBLE DISPOSSESSION is not necessary to maintain trespass or trover; any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damaged, is sufficient. *Allen v. Crary*, 566.
5. BROKER PURCHASING PROPERTY from one who has no title, for value, and *bona fide*, and shipping it to his principal, is liable in trover to the true owner. *Williams v. Merle*, 604.

See TAXATION, 2, 3, 4.

USAGE.

1. USAGES OR CUSTOMS OF PARTICULAR PLACES are not binding unless the parties contract in reference to them, and if the contract be in writing,

the reference ought to appear by its terms. *Eager v. Atlas Ins. Co.*, 363.

2. COURTS TAKE NO NOTICE OF LOCAL USAGES, but they must be proved like other facts, and, necessarily, by parol evidence. *Id.*
3. LOCAL USAGE TO DEDUCT ONE THIRD NEW FOR OLD from the gross expense of repairs, will not control in construing a policy which does not refer to such usage. *Id.*
4. SUCH A USAGE IS OPPOSED to the rule of law on that subject, and to the essence of the contract of insurance. *Id.*

VARIANCE

A VARIANCE IN MERE MATTER OF FORM between the record of acquittal offered and that pleaded, is not sufficient to warrant its exclusion as evidence, especially when the prosecution out of which the acquittal arose was for a misdemeanor only. *Adams v. Lisher*, 102.

VENDOR AND VENDEE.

1. BOND EXECUTED BY THE VENDOR of a tract of land to the vendee, as indemnity to the latter for the loss of the land by a paramount title, is founded upon a sufficient consideration, although the vendee has not been evicted by such paramount title. *Butler v. Triplett*, 136.
2. WHERE THE VENDOR OF A TRACT of land covenants with the vendee, that if any of the land is lost, he will convey, of another tract, two acres for every one lost, and a paramount title appears, of which the vendor has notice, and subsequent to which he sells the land out of which the indemnity was to be made, for a price paid per acre, equal to that he received for the first tract sold, he will be accountable to the first vendee for the proceeds of twice as many acres as have been lost, although that amount be double the consideration that the latter paid for it. *Id.*
3. NO PRINCIPAL OF LAW ALLOWS one man to substitute himself as the vendor in a contract for the sale of land, in place of another, against the will of the vendee. *Taylor v. Porter*, 155.
4. VENDOR IN A CONTRACT FOR THE SALE of a tract of land, or his legal representatives as such, can alone make such title as the vendee will be compelled to accept, and the administrator of such vendor who holds in his own right the title to the land agreed to be conveyed, can not compel the vendee to accept the title under his contract with the deceased. *Id.*
5. VENDEE WHO HAS, WITHOUT SUCCESS, MADE EVERY REASONABLE EFFORT to obtain the title contracted to be conveyed to him, and who has abandoned the possession and filed his bill for a rescission, can not then be compelled to accept the title. *Id.*
6. COURTS OF EQUITY, IN THE RESCISSION OF CONTRACTS, seek as near as possible to place the parties in *statu quo*. *Id.*
7. VENDEE IN POSSESSION OF LAND, under a contract of purchase, is not chargeable with rents, nor entitled to interest on the money paid, as long as the parties abide by the contract. *Id.*
8. UPON THE DISAFFIRMANCE of such a contract, the vendee is chargeable with rents until he surrenders possession, and is entitled to interest until his money is refunded. *Id.*

9. WHERE THERE HAS BEEN A PARTIAL PAYMENT by the vendee in such a contract, upon it being disaffirmed, there should be an equitable adjustment of rent and interest. *Id.*
10. VENDEE IN A CONTRACT OF PURCHASE is not compelled to go out of the state to notify the vendor that he renounces the contract; he may abandon the possession without notice. *Id.*
11. UPON THE RESCISSION of a contract for the sale of land for failure of the vendor to make the vendee a title as agreed, the former must take back the property without compensation for casual destruction, decay, or dilapidation of buildings, or other improvements, not caused by any negligent act or omission of the vendee; but the latter is liable if he has sold and removed or wantonly injured or destroyed such improvements. *Id.*
12. VENDOR WHO SELLS AND COVENANTS to CONVEY, without warranty, "all his right, title, and interest" in land, is bound to show that he has some right, title, or interest that he can convey. *Johnson v. Tool*, 162.
13. SUCH A COVENANT IMPLIES that he has some right, title, or interest which will pass by a conveyance to the vendee, and if he has none, the stipulation on his part is a nullity, and the contract will be rescinded at the instance of the vendee. *Id.*
14. SUCH VENDOR NEED NOT SHOW, however, that he has the best title, nor even a title regularly derived from the commonwealth, to comply with such agreement, but he must show that he had at least some right to the land. *Id.*
15. A NAKED POSSESSION might be such a right as would, if transferred and conveyed, satisfy such covenant on the vendor's part. *Id.*
16. PERSON AGREEING TO CONVEY SO MANY ACRES of land out of a larger tract, provided that quantity remains unsold and free from certain claims, may select it from any part of such larger tract, but he must lay it off, and show that it is unsold and free from such claims. *Id.*
17. SECRET ORAL CONTRACT between the grantor and grantee in an absolute conveyance that it is to be in trust for all the grantor's creditors, will not support it if it is void under the statute of Elizabeth without such contract. *Birely v. Staley*, 303.
18. SUCH SECRET AGREEMENT CAN NOT BE ENFORCED by the grantor or his creditors at law or in equity. *Id.*
19. EFFECT OF CONVEYING ALL THE RIGHT and title of a grantor is to convey all that has legally come to him, and that has not been legally parted with by him. *Adams v. Cuddy*, 330.
20. GRANTEE TAKING CONVEYANCE of his grantor's right takes the risk of that right. *Id.*
21. GRANTEE WHO LOSES HIS TITLE by failure to register his deed can not hold his grantor liable on the warranty therein, and therefore such grantor is not disqualified, by reason of interest, from testifying in a suit against such grantee. *Id.*

See BONA FIDE PURCHASERS; DEEDS; EASEMENTS AND SERVITUDES.

WAGERS.

ALL WAGERS upon matters in which the parties have no interest, beyond what is created by the wager itself, are void. *Hoit v. Hodge*, 451.

WARRANTY.

See COVENANTS IN DEEDS; SALES.

WATER-COURSES.

1. CONNECTICUT RIVER BEING A PUBLIC NAVIGABLE RIVER, *prima facie* and of common right, belongs to the sovereign power. *Hollister v. Union Co.*, 36.
2. IMPROVING NAVIGATION OF RIVER.—Lands of individuals bounded on the Connecticut river are granted to those individuals, or to those under whom they claim, by the state, which did not by such grant divest itself of the right and power of improving the navigation of the river. *Id.*
3. FOR THE PURPOSES OF NAVIGATION AND FISHERY, a state may do any acts with respect to its public navigable rivers, not inconsistent with the principles of eminent domain. *Id.*
4. INDIVIDUAL OWNERS SHOULD PROTECT THEIR BANKS from the encroachment of rivers; the duty does not rest upon the corporation empowered to improve the navigation. *Id.*
5. THE PUBLIC BEING THE OWNERS of the Connecticut river, have an unquestionable right to improve the navigation of it, without any liability for remote and consequential damages to individuals. *Id.*
6. PRIVATE PROPERTY CAN NOT BE CONSIDERED AS TAKEN for public use, within the meaning of the constitutional provision, where the lands of individual proprietors are washed away by reason of the acts of a corporation empowered to improve the navigation of a river. *Id.*
7. THE WASHING AWAY of the lands of individual owners by reason of the acts of a corporation in the *bona fide* performance of their powers in the improving the navigation of a river, is a remote and consequential injury for which no action lies. *Id.*
8. DIVERTING THE FLOW OF WATER.—Where a stream of water flows around an island, one branch being very much larger than the other, the owner of a mill on the smaller branch can not place obstructions at the head of the island, so as to cause one half the stream to pass on his side. *Crooker v. Bragg*, 555.
9. A MAN IS ENTITLED TO THE ENJOYMENT of a stream in its natural flow; it is not enough that one who has diverted the water has left what could be utilized by expense and trouble. *Id.*
10. ONE THROUGH WHOSE LANDS A STREAM NATURALLY FLOWS is entitled to have the whole pass through it, though he may not require the whole or any part for the use of machinery. *Id.*

WILLS.

1. A PRETERMITTED CHILD is entitled to the same share of the father's estate that he would have had if there had been no will. *Woodard v. Spiller*, 139.
2. TO CONSTITUTE TESTAMENTARY CAPACITY in Maryland, the statute requires that the testator be "of sound and disposing mind, and capable of executing a valid deed or contract." *Davis v. Calvert*, 282.
3. CONDITION OF THE TESTATOR'S MIND, at the time of executing or acknowledging the will, determines his capacity. *Id.*

4. EVIDENCE OF THE TESTATOR'S MENTAL AND PHYSICAL CONDITION, before and after executing the will, is admissible for the purpose of throwing light on his state of mind at the time of execution. *Id.*
5. INCAPACITY MAY BE ESTABLISHED by proof of conversation, acts, or declaration of the testator inconsistent with sanity, or by all of them taken together. *Id.*
6. THAT THE DISPOSITIONS OF A WILL ARE IMPRUDENT, and not to be accounted for, is not sufficient of itself to avoid it, but may furnish intrinsic evidence tending to show incapacity in the testator, and throwing suspicion upon the will, as where those having the strongest natural claims upon the testator's bounty are excluded without any apparent or known cause. *Id.*
7. CONTENTS AND MANNER OF EXECUTION OF A WILL, the circumstances under which it was made, the testator's situation, the condition and relative situation of the legatees and devisees, and of the testator's connections, their claims upon him and the terms on which he stood with them, and the nature and extent of his estate, are all proper to go before the jury in determining the question of incapacity. *Id.*
8. IMPORTUNITY AND UNDUE INFLUENCE are not inseparably connected with fraud, but may be fraudulently exerted. *Id.*
9. NOT EVERY DEGREE OF IMPORTUNITY will invalidate a will; honest and moderate intercession, persuasion, or flattery, unaccompanied by fraud or deceit, and where the testator is not threatened or put in fear, will not have that effect. *Id.*
10. GREAT AND OVERRULING IMPORTUNITY and undue influence, without fraud, may, under particular circumstances, avoid a will. *Id.*
11. DEGREE OF IMPORTUNITY or undue influence which destroys the free agency of a testator, and renders the will not his free, unconstrained act, is sufficient to invalidate it, not only as to the person using such influence, but as to all others intended to be benefited by it. *Id.*
12. WILL MADE UNDER THE GENERAL CONTROLLING AND CONTINUING INFLUENCE OF FEAR or dominion over the testator, by one who has put him in fear, is invalid, though such influence is not immediately exercised with respect to the will; and proof of threats or violence at the time of making the will, is unnecessary. *Id.*
13. WILL OBTAINED BY FRAUD is void; for fraud vitiates everything with which it is connected. *Id.*
14. CONDITION, CHARACTER, AND CONDUCT of persons around the testator are important subjects of inquiry, in reference to his situation, family, and relations, the extent and nature of his estate, the dispositions of the will, and the devisees under it, in determining whether it was obtained by undue influence and fraud. *Id.*
15. EVIDENCE OF ILLICIT RELATIONS between the testator and a woman to whom and her children the whole estate was given, and that she was a woman of dissolute character, and, while inducing the testator, an old and feeble man, to confide in her fidelity, was carrying on lewd intercourse with other men, is admissible, as tending to show undue influence. *Id.*
16. EVIDENCE THAT THE MISTRESS' CHILDREN were not the testator's, in such a case, and that by reason of age and infirmity he was incapable of be-

- getting children, where the will shows that he provided for them under the belief that they were his offspring, is admissible. *Id.*
17. WHERE ANY PART OF A WILL WAS FIRST SUGGESTED BY ANOTHER, it must appear that its adoption by the testator was not due to mental incapacity, fraud, or undue influence. *Id.*
18. IMPOSITION OR UNDUE INFLUENCE must have operated upon and controlled the testator at the time of executing the will, to invalidate it on that ground, of which the jury must judge, but no direct or immediate act of fraud or undue influence exerted at that time, need be shown. *Id.*
19. THAT SOME OF THE DEVISEES WERE SLAVES at the time of the making of the will, and therefore incapable of taking, where there is a contingent devise over to one of the caveatees, who is charged with undue influence in procuring the will, is a material subject of inquiry. *Id.*

WITNESSES.

PERSON IS NOT INCOMPETENT to be a witness in a particular case on the ground of interest, unless his rights will be affected by the determination therein; and the fact that he has an interest like that of the party offering him does not render him incompetent. *Woodard v. Spiller*, 139.

See EVIDENCE.



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